

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,)	
W.A. DREW EDMONDSON, in his)	
capacity as ATTORNEY GENERAL)	
OF THE STATE OF OKLAHOMA,)	
et al.)	
)	
Plaintiffs,)	
)	
vs.)	No. 05-CV-329-GKF-PJC
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

VOLUME VI - PM
TRANSCRIPT OF TRIAL PROCEEDINGS
OCTOBER 1, 2009
BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE

REPORTED BY: BRIAN P. NEIL, CSR-RPR, RMR, CRR
 United States Court Reporter

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1 Thursday, October 1, 2009

2 * * * * *

3 THE COURT: Mr. Garren. Mr. Bullock.

4 MR. BULLOCK: One quick matter. We
5 received this morning about the time we came over a
6 bench brief from the defendants regarding the
7 admissibility of the ads.

8 THE COURT: Yes.

9 MR. BULLOCK: If we could have until
10 Saturday to file a response to that.

11 THE COURT: Any objection?

12 MR. VOLPE: No objection.

13 THE COURT: Very well. Thank you.

14 MR. BULLOCK: Okay.

15 THE COURT: Mr. Garren.

16 **CONTINUED DIRECT EXAMINATION**

17 **BY MR. GARREN:**

18 Q. Mr. Hilsher, you talked about certain
19 representatives that have attended the task force when
20 you were attending it, and you mentioned Mr. Schaffer,
21 Mr. Rutherford and Mr. Simmons by name, and
22 Mr. Harriman. Did those gentlemen attend a single
23 meeting?

24 MR. ELROD: Your Honor -- Rick, just a
25 second. I'm sorry to interpose an objection. I hate

1 to interrupt counsel, but he misstates the evidence.
2 That's not what the state of the evidence is.

3 THE COURT: I think that's exactly --

4 MR. ELROD: He said he wasn't sure who
5 was there.

6 THE COURT: Well, I think that's
7 exactly -- he precisely related the testimony.
8 Overruled.

9 Go ahead.

10 Q. (BY MR. GARREN) Did they attend a single
11 meeting or multiple meetings, if you can remember?

12 A. I know Mr. Rutherford was there on several
13 occasions. I believe Mr. Schaffer was there on
14 several occasions. I couldn't tell you about
15 Mr. Simmons or Mr. Harriman.

16 Q. Let's talk a little bit now about the Scenic
17 Rivers Commission and your participation on that
18 commission.

19 Generally, what is its role, and I mean
20 briefly? Mr. Fite's going to have an opportunity to
21 tell us in detail, but just some background for Your
22 Honor.

23 A. The role of the Scenic Rivers Commission our
24 purpose, is to protect the environmental aesthetic
25 conditions of the scenic rivers with regard to

1 their -- you know, the economic surrounding them,
2 canoe operators, and all that sort of thing.

3 Q. How often do you meet?

4 A. We meet anywhere from four to six times a
5 year.

6 Q. And at those meetings, are you provided
7 information that is collected, either by the Scenic
8 Rivers Commission its staff, or other agency of the
9 State of Oklahoma, that deal with that river?

10 A. Oh, yes.

11 Q. Tell us just briefly, if you would, what kind
12 of materials that you would expect to see as a
13 commission member about the river.

14 A. We receive reports from the U.S. Geological
15 Survey. We receive reports from the Oklahoma Water
16 Resources Board. Both of those have to do with water
17 sampling events. And USGS, for instance, Judge, comes
18 to us seeking funding for water-sampling projects, and
19 we receive reports back from the USGS on what sort
20 of --

21 MR. VOLPE: Judge, I'm going to object.
22 Excuse me. I'm sorry. It's okay if he wants to say
23 what reports he received, but this witness can't
24 testify about what the reports contain. That's
25 hearsay.

1 THE COURT: I don't believe he was
2 attempting to. Overruled. Go ahead.

3 A. It's just in the nature of what their results
4 are from the sampling projects they take on. OWRB,
5 for instance, will also come in and make presentations
6 based on -- you know, one that comes to mind is when
7 they were considering --

8 MR. VOLPE: Objection, Judge. I'm
9 sorry. He is getting into what the reports say or the
10 presentations say.

11 THE COURT: I don't believe so yet. But
12 I'm sure you'll be ready when he does.

13 MR. VOLPE: I'm standing by, Judge.

14 THE COURT: Go ahead.

15 A. Generally, those presentations have to do
16 with things like setting a numerical standard. So
17 there would be a presentation on that. We've had
18 other scientists, Dr. Riley Needham, for instance,
19 come and provide reports on bacteriological findings.
20 From the USGS that he did some work on making
21 correlation analysis on.

22 We receive -- we receive reports from the
23 conservation commission. We'll receive reports on
24 occasion from members of academia. We had, for
25 instance, an OSU professor come and give a report of

1 some findings he made about transport of waste
2 products to the river, that sort of thing.

3 Q. Are you also provided the data that underlies
4 these reports that you've just described?

5 A. The data comes in -- we don't see every sheet
6 but it comes in compilations. You'll see a chart, a
7 graph of what the data is with representations of when
8 it was collected and all that sort of thing.

9 Q. As a commission, is it your role to ask
10 questions and obtain information in order to carry out
11 the purposes of the Scenic Rivers Commission?

12 A. Sure.

13 Q. And has the Scenic Rivers Commission
14 identified any major water quality problems in the
15 IRW?

16 A. Yes. I mean, beginning from my time on the
17 commission in 1998, we received reports from USGS
18 concerning high-water flow transport of phosphorus
19 into -- into the river and the tributaries.

20 Q. In addition to phosphorus -- well, let me ask
21 you this. When you receive these kind of reports and
22 information, do you have any responsibility on the
23 commission to do anything with it?

24 A. Well, yes. I mean, our role is we receive
25 information and then we react to it in one way or

1 another. Or we make a decision not to react to it.

2 This '99 report that I'm recalling is what
3 led us to change the sampling protocol from simply a
4 base flow, you know, every Wednesday type of an
5 analysis to, well, we going to start measuring high
6 rainfall events to see what storm water events do in
7 terms of whether there's an increase in nutrients or
8 no difference. So that is what prompted us to start
9 spending our money differently on what we were
10 tracking in the watershed.

11 Q. Has the Scenic Rivers Commission identified
12 major sources of contributors to the phosphorus you
13 described earlier?

14 A. Well, you know, we haven't made a list, but
15 the reports that we've seen have identified the
16 poultry industry as a --

17 MR. ELROD: Your Honor, without laying a
18 foundation, I'm going to have to object to this line.

19 MR. VOLPE: Judge, may I add to this,
20 please?

21 THE COURT: You may, sir.

22 MR. VOLPE: It calls for expert opinion.
23 It also calls for a recitation of hearsay.

24 THE COURT: The question only is whether
25 or not the Scenic Rivers Commission has identified

1 major sources. The objection's sustained as to the
2 answer. You may answer the question.

3 A. If the question is again, had we identified,
4 the answer is yes.

5 Q. (BY MR. GARREN) And can you tell the court
6 what those major sources are that you have
7 identified?

8 MR. VOLPE: Judge, the same objection.

9 MR. ELROD: Same objection, Your
10 Honor.

11 THE COURT: Sustained.

12 Q. (BY MR. GARREN) With regard to the major
13 sources that may or may not have been identified, does
14 the commission itself undertake any sampling events on
15 its own?

16 A. I'm not exactly sure what you mean by "on its
17 own."

18 Q. Let me --

19 A. We contribute money to people who sample.

20 Q. And give me an example of those who do
21 sampling for the commission.

22 A. Okay. We have partnered with other state
23 agencies, like Water Resources Board, to fund USGS
24 sampling. So it's actually the USGS that's doing that
25 sampling. We have had occasions where in order to

1 make our dollars go farther, Ed Fite has actually done
2 sampling. Last summer, summer before that. But
3 primarily it's USGS that's done the sampling programs.

4 Q. Does the Scenic Rivers Commission itself
5 prepare written reports on basically data collection?

6 A. No.

7 Q. All right.

8 A. I mean, we have minutes, of course, of our
9 meetings that reflect information that's been provided
10 to the commission.

11 Q. Does the Scenic Rivers Commission report to
12 any other agency in the State of Oklahoma's
13 government?

14 A. I'm not understanding the question, do we
15 report to.

16 Q. All right. Do you -- are you a part of any
17 other agency structure within the Oklahoma government
18 or are you freestanding?

19 A. Well, we are responsive to the Secretary of
20 the Environment. We have relationships with, you
21 know, the tourism department. For instance, at times,
22 we've had different personnel who have been actually
23 attached to tourism. Our rangers, for instance, in
24 the past. You know, we have working relationships
25 with OWRB. We have working relationships with DEQ,

1 with the conservation commission. But other than the
2 Secretary of Environment's downward organizational
3 thrust, we don't report to anybody.

4 Q. Let me ask this then.

5 Does the Scenic Rivers Commission have any
6 regulatory authority?

7 A. We have -- we have some limited regulatory
8 authority.

9 Q. Just tell us what the nature of that
10 regulatory authority is.

11 A. Well, we have -- we have the -- we have
12 the -- our rangers enforce rules and regulations up
13 and down the river, Styrofoam, glass, etcetera. We
14 have authority under the statute to recommend, I
15 think, nuisance actions. We've got authority with
16 regard to the canoe outfitters or flotation device
17 outfitters. So we've got a whole host of different
18 authorities under our statutes and regs.

19 Q. You mentioned that the purpose of this
20 commission is to preserve and protect the water
21 quality in the Illinois River; is that correct?

22 A. Correct.

23 Q. And do you have any regulatory authority over
24 land-applied poultry waste?

25 A. No.

1 Q. Let's talk again a little bit about your
2 history and involvement in the scenic river area.

3 When did you first see the Illinois River?

4 A. First saw it spring break 1974.

5 Q. And what caused you to be here in this area
6 to see it?

7 A. I was a sophomore in college at the
8 University of Houston. I traveled up here to visit a
9 friend of mine in Tahlequah.

10 MR. VOLPE: Judge, objection.

11 THE COURT: We've been over this. Let's
12 move on.

13 MR. GARREN: I understand. We'll move
14 on.

15 Q. (BY MR. GARREN) How long did you live in the
16 Tahlequah area at that time?

17 A. I came to live in Tahlequah in August of 1974
18 and lived there until August of 1976.

19 Q. All right. And you mentioned you lived in a
20 cabin on the river; correct?

21 A. Right.

22 Q. Did you float the river?

23 A. Regularly.

24 Q. Did you observe people recreating in the
25 river?

1 A. Oh, yeah.

2 Q. What would you describe as the condition of
3 the water observed when you were either floating it or
4 recreating it -- recreating in that river?

5 A. Water was clear. More than that, the gravel
6 base -- I mean, this is an Ozark Mountain stream with
7 a gravel base -- the rocks were distinct. I mean, you
8 could tell if a rock was light gray or if it was black
9 or if it was brown, and there wasn't, you know, algae,
10 green algae, growing on it or dead brown algae growing
11 on it. It was a clear-bottom stream.

12 Q. After you left college, what was the next
13 time for you to come back to the Illinois River and
14 observe it?

15 A. I don't believe I got back out onto the river
16 until probably mid to late '90s.

17 Q. And just tell the court, if you would,
18 please, in comparison to the description you've just
19 provided us as to the water quality and its condition,
20 how did you observe those same characteristics in that
21 time in the '90s?

22 A. The water was murky. The bottom is what was
23 probably more startling, and that is that the rocks
24 were now covered with either a green live algae or a
25 brown dead algae. You know, there were other

1 occasions when you were there that the water wasn't so
2 murky. I mean, you could still have clear water, but
3 you still had the algae on the bottoms, either green
4 or brown, depending on whether it's live or dead.

5 Q. Have you observed the river since 1998, sir?

6 A. Yes.

7 Q. And how would you compare what you -- well,
8 when was the last time you observed it?

9 A. Probably in the spring of this year or
10 possibly in the fall of last year. I forget. We had
11 a -- we had a subcommittee meeting at one of our
12 commissioner's homes that lives up -- lives up on the
13 north stretch of the river and I saw it then. I've
14 seen it on other occasions, probably a couple of years
15 ago, when we were doing -- had some sampling protocols
16 that we were looking at.

17 Q. How would you -- are you able to characterize
18 the -- any difference in the water quality that you
19 observed recently compared to 1998?

20 MR. MCDANIEL: Excuse me. Objection,
21 Your Honor. Given that we're looking at potentially
22 more than a hundred miles of the Illinois River in the
23 state, I don't think Mr. Hilsher's testimony about
24 what he saw at some unidentified location is
25 particularly relevant or probative.

1 THE COURT: Overruled.

2 A. It was basically as I had seen it in the
3 '90s. It was, you know -- the water was -- I think on
4 that occasion at Commissioner Randall's, the water was
5 clear, it wasn't murky, but you still had that green
6 and brown algae that was covering the bottom.

7 Q. (BY MR. GARREN) Let's talk about your
8 knowledge and experience in the capacity as chairman.
9 Scenic Rivers Commission. Do you have a view what may
10 be the greatest threat to the quality of the water in
11 the Illinois River Watershed?

12 MR. VOLPE: Objection, Your Honor.

13 THE COURT: Sustained.

14 MR. GARREN: Oh, I'm sorry, Judge. I
15 was interrupted. It was sustained?

16 THE COURT: Yes.

17 MR. GARREN: Judge, I would offer that
18 we continue to hear this argument that the agencies
19 are at war with each other. In order to show this
20 particular agency's view, at least from its head of
21 the agency at this time, I think it would be very
22 probative and relevant.

23 THE COURT: Response?

24 MR. VOLPE: Still opinion, Judge. It's
25 opinion testimony, it's expert testimony, it's not

1 relevant, and --

2 THE COURT: Well, of course, we can get
3 to that in terms of just asking whether or not this
4 particular agency is supportive of the lawsuit --

5 MR. GARREN: I think this is a different
6 issue, Judge.

7 THE COURT: -- rather than getting
8 causation. In fact, your question was, do you have a
9 view as may be the greatest threat. Sustained.

10 Q. (BY MR. GARREN) Based upon your personal
11 observations, do you have an opinion, sir, what
12 appears to be, or what is, a threat to the Illinois
13 River today?

14 MR. VOLPE: I'm going to object to that
15 as well, Judge. That's an opinion. Not been
16 qualified as an expert to offer opinions in this
17 matter.

18 MR. GARREN: He's the chairman of the
19 Scenic Rivers Commission, Judge. He's gathering data.
20 He's looking at information. He has an authority to
21 report that information, other agencies act on it.

22 THE COURT: Sustained. Personal
23 observation as to what appears to be or what may be a
24 threat? The objection's sustained.

25 Q. (BY MR. GARREN) All right. In reviewing the

1 reports and data that's supplied to the commission for
2 its purposes in performing its functions, have you
3 read that material when supplied, sir?

4 A. Yes.

5 Q. And do you use it in the functions of the
6 Scenic Rivers Commission and as its chairman? As you
7 sit here today, have you done so?

8 A. Yes.

9 Q. And is that material discussed at the
10 commission?

11 A. Yes.

12 Q. And does the commission have an opinion, if
13 you know, with regard to what may be, or what is, a
14 threat to the water quality in the Illinois River
15 Watershed?

16 MR. VOLPE: Judge, I think
17 that's -- objection. I believe that that is just a
18 back-door to what we've just previously excluded.

19 THE COURT: It's hearsay. It precludes
20 the defendants from an opportunity to cross-examine
21 the source. The objection's sustained.

22 Q. (BY MR. GARREN) Let me ask you this.

23 What, if anything, has the commission done to
24 address any source of phosphorus or bacteria in the
25 Illinois River Watershed?

1 A. One of the things we did as a commission was
2 to recommend to the Oklahoma Water Resources Board
3 a .02 phosphorus standard for the Illinois River.
4 This was unanimously passed by the commission as our
5 recommendation on what numerical standard should be
6 applied to the scenic rivers.

7 Q. When did that occur?

8 A. I think that was in or about 2002.

9 Q. To whom was that recommendation made?

10 A. We made that recommendation to the Oklahoma
11 Water Resources Board.

12 Q. Does the Scenic River have any authority in
13 causing such a numerical standard to be applied in the
14 watershed?

15 A. No. That's -- we have the power to
16 recommend; we do not have the power to promulgate that
17 as a standard.

18 Q. What is that standard intended to protect the
19 water from?

20 A. It's to protect the level -- or to limit the
21 amount of phosphorus that would otherwise encourage
22 algae growth.

23 Q. Based on your experience with the Scenic
24 Rivers Commission and the task force and your exposure
25 to working with environmental law and the reports and

1 materials that you've had opportunity to examine and
2 study, do you have an opinion whether or not
3 land-applied poultry waste ends up the Illinois River
4 water?

5 MR. VOLPE: Judge, I object. There are
6 many objections embedded in that question, but my
7 primary objection is it calls for expert testimony and
8 it calls for opinion testimony. This witness has not
9 been disclosed as offering expert testimony. It also
10 calls for hearsay.

11 THE COURT: Mr. Garren.

12 MR. GARREN: Yes, Your Honor.
13 Obviously, the problem that I'm seeing here is that
14 you can continually make these objections only to
15 muzzle the agencies that have some authority to
16 address and speak to the concerns that they observe.

17 THE COURT: I'm sorry. That doesn't
18 address the basis for the objection. That's argument.
19 It calls for expert testimony is the basis of the
20 objection. Opinion testimony, and that this witness
21 has not been disclosed as offering expert testimony.
22 Your response?

23 MR. GARREN: I've made it, Your Honor.
24 I'll move to a new question.

25 THE COURT: All right. Sustained.

1 Q. (BY MR. GARREN) What, if anything, is the
2 commission doing to warn recreators about whether they
3 should or should not be in the waters of the Illinois
4 River?

5 A. We have had on our agenda a discussion about
6 whether or not there should be bacteria warnings for
7 the Illinois River. Those discussions ended in a
8 tabled motion. After that, we were presented with DEQ
9 who was, I think, alerted to the fact that we had
10 discussions about bacteria issues. There was a poster,
11 large poster, with a set of things to do. If you're
12 going to have primary body contact in the waters, not
13 just in the Illinois River, but in any rivers. That
14 was produced by DEQ. I'm not sure how many different
15 agencies were also represented on that poster and/or
16 whether our agency actually had their insignia on
17 there. But I think that was a result as a part of our
18 interest in that to be posted at float operator's
19 locations and at places where -- access points to the
20 river.

21 Q. Did the Scenic Rivers Commission make a
22 recommendation that that be done?

23 A. We did not make a recommendation that that be
24 done. But it was a point of discussion at at least
25 one, if not more, than one of our meetings.

1 Q. As the chairman of the Scenic Rivers
2 Commission, do you have any authority to speak for
3 that commission?

4 A. You know, I've taken the position that unless
5 we have a vote that is an affirmative vote, that no
6 commissioner has the right to speak for the
7 commission.

8 It's not a rule that one can enforce because
9 it seems that we have a number of commissioners who
10 speak out with, you know, the tag line "commissioner"
11 after the name.

12 Q. Let me ask you this. Do you know a gentleman
13 by the name of Ed Fite?

14 A. Yes, I do.

15 Q. How long have you known Mr. Fite?

16 A. I met Ed in 1997 when we were both members of
17 the governor's Animal Waste Task Force.

18 Q. Do you have regular dealings with him now?

19 A. Yes, I do. Because he remains the
20 administrator of the Oklahoma Scenic Rivers
21 Commission.

22 Q. Do you consult and confer with him outside
23 your duties of the Scenic Rivers Commission?

24 A. Yes, I do. Mr. Fite is also a member of the
25 Oklahoma Water Resources Board. Mr. Fite is also on

1 the Cherokee Nation Environmental Commission.

2 Mr. Fite is also a personal friend, and, when I need
3 somebody with a chainsaw to come help me at church,
4 Ed's there.

5 Q. If you needed information about the Illinois
6 River Watershed, who would you ask first for that
7 information?

8 A. Ed Fite is a walking encyclopedia. And
9 better than that, he remembers everybody's name. The
10 judge. He remembers everything.

11 Q. Are you aware of anyone more knowledgeable
12 about the river than Mr. Fite?

13 MR. VOLPE: I'm going to object, Judge.
14 What we have now is a witness vouching for the
15 credibility of a future witness. I don't think that's
16 proper.

17 THE COURT: Overruled. I think we can
18 probably take judicial notice of that. Go ahead.

19 A. I don't know of anyone with the educational
20 credentials, experience credentials, and time on the
21 river that Ed Fite has.

22 MR. GARREN: I'll pass the witness, Your
23 Honor.

24 THE COURT: Cross-examination.
25

CROSS-EXAMINATION

BY MR. ELROD:

Q. Good afternoon, sir.

A. Good afternoon, Mr. Elrod.

Q. Gerald, I take it from your resumé that you have trouble holding down a job?

A. I've had more jobs than Frank Keating. That's saying something.

Q. Just to make the record clear, the litigation that you brought against my client, Simmons Foods, that we lawyered about during the late 1990s had nothing to do with land application of chicken litter, it had to do with the wastewater treatment facility at Southwest City; is that true, sir?

A. That's correct. But I think we went into the 2000s with that litigation.

Q. Yep. At the time of the Keating's Animal Waste Task Force, you know that Claud Rutherford was, in fact, an employee of Simmons Foods; is that true, sir?

A. I thought -- maybe I've got his title and Mr. Harriman's mixed up. I thought he was an industry representative.

Q. Okay. And he served as an informational liaison between information being gathered by the

1 poultry companies for the benefit of the task force
2 and the task force itself; is that true?

3 A. I don't recall that but that wouldn't
4 surprise me.

5 Q. And as has already been pointed out, the
6 efforts of the Keating Animal Waste Task Force
7 resulted in the 1998 acts that we've talked about in
8 this courtroom; is that true?

9 A. Our recommendations did seem to appear to be
10 the motivating point for the legislation.

11 Q. Yes, sir. And I think I heard you testify
12 that prior to the Keating Animal Waste Task Force,
13 that you actually observed or saw some Animal Waste
14 Management Plans issued to growers?

15 A. No, sir. It was as a part of the task force.
16 If I saw one -- and I'm not certain that I did -- or
17 talked about one, it would have been a part of our
18 field trip that the task force took to Mr. Medford's
19 farm in Cherokee or Delaware County --

20 Q. So it would be true, sir, that if you saw an
21 Animal Waste Management Plan while you were a member
22 of the Keating Animal Waste Task Force, you would have
23 seen that plan prior to the State of Oklahoma
24 requiring the plans exist?

25 A. If I saw it as opposed to simply talking

1 about what they were doing with their animal waste.

2 That's where I'm not clear, Mr. Elrod, whether we saw
3 it or whether we just talked about what he did at the
4 facility.

5 Q. You know from having been involved with these
6 issues for some period of time and having lived on the
7 earth as long as you have, that plans were in
8 existence on a voluntary basis before being compelled
9 to be in existence by the State of Oklahoma; isn't
10 that true?

11 A. I'm not sure if there were written plans or
12 not. I know that there were, as they were described,
13 best management practices that growers were attempting
14 to deal with.

15 Q. Now, you testified -- you gave your
16 deposition on March 3, 2009; is that true, sir?

17 A. Yes. I think so.

18 Q. And in the course of that deposition, you
19 testified that the last time that you floated the
20 river was in 1987; is that correct?

21 A. That is -- that would still be correct.

22 Q. About 22 years ago?

23 A. That's right.

24 Q. And the last time that you had been to Lake
25 Tenkiller was in 1985, some 24 years ago?

1 A. I think if I said "last time been to the
2 lake," that would be in error. Last time I was in the
3 lake was probably 1985.

4 Q. And you testified that you would not be able
5 to offer any opinion regarding, quote, murkiness, end
6 quote, in the river between 1998 and 2008; is that
7 true?

8 A. Tell me the dates again, please.

9 Q. '98 to 2008. The last ten years.

10 A. Yeah. I may have said that.

11 Q. Okay. And that one of your concerns as a
12 commissioner has been the Watts lagoons. Correct,
13 sir?

14 A. That was one of the initial concerns we had
15 on the Scenic Rivers Commission when I joined.

16 Q. Okay.

17 A. It hasn't been a recent issue.

18 Q. And I will represent you that His Honor saw
19 some aerial photographs of the Watts lagoons during
20 opening statement. But to be more precise, the Watts
21 lagoons are just inside the state of Oklahoma; is that
22 correct?

23 MR. GARREN: Object, Your Honor. This
24 is outside the scope. It's not relevant to the
25 issues.

1 THE COURT: Sustained.

2 Q. (BY MR. ELROD) Let's move to activities of
3 the Scenic Rivers Commission.

4 Many of the defendants sitting at this table
5 offered, and, in fact, have given to, the Scenic
6 Rivers Commission a gift of \$1,100,000; isn't that
7 right?

8 A. Yes.

9 Q. And the Scenic Rivers Commission total budget
10 provided by the State of Oklahoma on an annual basis
11 is around \$500,000 a year?

12 A. I'm not sure what the annual budget is.

13 Q. You're chairman of the commission and you
14 can't tell us what the annual budget is, sir?

15 A. If I had the budget numbers in front of me, I
16 could tell you. But that's not a number I keep in my
17 head.

18 Q. You don't know the gross budget of the
19 commission on an annual basis that you oversee?

20 A. No, sir, I don't.

21 Q. All right. If the testimony from Mr. Ed Fite
22 is that the annual budget is around \$500,000 a year,
23 then the gift given to the commission to be utilized
24 for good works would be double the amount of money
25 provided by the State of Oklahoma on an annual basis;

1 is that true?

2 MR. GARREN: Objection; relevance, Your
3 Honor.

4 THE COURT: What's the relevance?

5 MR. ELROD: The relevance, Your Honor,
6 is the use to which this money has been put by the
7 Scenic Rivers Commission in terms of what its doing.

8 MR. GARREN: That wasn't the question,
9 Your Honor. If we were doing the math --

10 MR. ELROD: Well, I'm leading into it.
11 I'm warming up to it, Judge.

12 THE COURT: All right. On that
13 representation, overruled.

14 Go ahead.

15 A. Now, your math -- your math is correct.

16 Q. (BY MR. ELROD) All right, sir. Now,
17 Mr. Hilsher, the commission has been able to parlay
18 that money, plus some money from the Oklahoma
19 Conservation Commission, I think, and maybe some CREP
20 grant money into about a \$4 million pot to be used for
21 riparian conservation easement purchases on the
22 Oklahoma side; is that true?

23 A. We've used a good part of the poultry money
24 for that purpose. I'm not sure again how -- whether
25 that equals \$4 million of total funds, but there was a

1 matching part and you provided -- and your clients
2 provided the match.

3 Q. All right. And that money is presently as we
4 sit here today being utilized by the Scenic Rivers
5 Commission to -- for bank stabilization purposes and
6 to buy conservation easements up and down the river in
7 Oklahoma; is that true?

8 A. As well as building and improving bathrooms
9 on the river.

10 Q. Bathrooms?

11 A. Yes.

12 Q. Speaking about bathrooms, there was a time
13 prior to about ten years ago when the commission
14 determined that bathrooms up and down the river
15 were -- had leakage problems? If you don't know about
16 that --

17 A. Well, I don't know about that.

18 Q. Okay. I'll get into that with Mr. Fite.

19 By the way, you voted against acceptance of
20 that gift from the poultry companies, didn't you?

21 A. Yes, I did.

22 Q. All right. Did you bid to become plaintiff's
23 counsel in this case?

24 A. Yes, I did.

25 MR. GARREN: Objection; relevance.

1 THE COURT: Overruled.

2 Q. (BY MR. ELROD) The answer is?

3 A. Yes.

4 Q. Yes, you did?

5 A. Yes, sir.

6 Q. You are aware, by virtue of being a
7 commissioner on the Scenic Rivers Commission and
8 attending the meetings, that there exists on the
9 Arkansas side of the line an organization called the
10 Illinois River Watershed Partnership?

11 A. Yes, sir.

12 Q. And it is administered by a Ph.D. Delia Haak,
13 H-a-a-k; is that true?

14 A. Yes, sir.

15 Q. And she attends many of your meetings and
16 gives -- she attends virtually every meeting and gives
17 reports on activities going on in Arkansas; is that
18 right?

19 A. She is a frequent visitor to our conference,
20 and she does have a place on the agenda to give a
21 report.

22 Q. Okay. And you're aware that Mark Simmons is
23 a member of the board in the IRWP?

24 A. Yes, sir.

25 Q. Mr. Simmons has attended many of your

1 meetings?

2 A. I wouldn't say many of our meetings.

3 Q. Some?

4 A. But some, yes.

5 Q. Mr. Archie Schaffer from Tyson's has attended
6 some of your meetings?

7 A. I remember he's attended one.

8 Q. That was when they gave you that great big
9 blown-up check; right?

10 A. Maybe twice.

11 Q. All right. If the Scenic Rivers Commission
12 chose to do it, given the power and the regulatory
13 power you have over concessionaires, people who rent
14 rafts and canoes, you could shut them down, could you
15 not?

16 A. No. I don't think we could shut them down on
17 a whim. I think we would have to shut them down
18 for --

19 Q. Good cause?

20 A. -- some good cause.

21 Q. And you've never done that?

22 A. Not during my experience, we have not.

23 Q. And you've been on the commission for over
24 ten years?

25 A. Yes, sir.

1 Q. During that period of time, you've never said
2 to the concessionaires, guys, I'm sorry, but we got to
3 shut you down this weekend because people might get
4 sick? Have you done that?

5 A. No.

6 Q. All right. And as a matter of fact, I think
7 I saw your deposition that you issue about -- you have
8 outstanding about 3900 permits?

9 A. 3900 permits was a limit stated in our
10 regulations.

11 Q. All right. And is that the number that are
12 outstanding?

13 A. I think we were back down to 3900, but there
14 was a time when the commission voted to go in excess
15 of 3900.

16 Q. And just for record purposes -- I think we
17 all understand what that means -- but that means the
18 concessionaires up and down Highway 10 would not be
19 able to have more than 3900 rafts or canoes on the
20 river at any point in time?

21 A. Yes.

22 Q. You hesitated.

23 A. Well -- well, the permit goes to a flotation
24 device. So they could have 3900 licensed flotation
25 devices in their inventory. But what typically

1 happens is because of the changing river elevations,
2 some days -- excuse me -- some days are good for
3 rafts, some days are good for canoes. So it would be
4 a -- in fact, I think it's an occasion that's never
5 happened, that you would have 3900 flotation devices
6 on the river on any particular day. Ed Fite could tell
7 you what the maximum number that they have floated, if
8 that's important to you.

9 Q. Mr. Hilsher, those are my questions, I think.
10 Thank you very much.

11 THE COURT: Other cross-examination?
12 Mr. McDaniel.

13 **CROSS-EXAMINATION**

14 **BY MR. MCDANIEL:**

15 Q. Good afternoon, Mr. Hilsher.

16 A. Good afternoon.

17 Q. You testified in direct that the commission
18 has the authority to recommend nuisance actions; is
19 that correct?

20 A. I believe that's true.

21 Q. Has the Scenic Rivers Commission by a
22 majority vote of its members issued a recommendation
23 or request that this lawsuit be brought against these
24 defendants?

25 MR. GARREN: Objection, Your Honor.

1 THE COURT: Overruled.

2 A. No.

3 Q. Thank you.

4 THE COURT: Any further
5 cross-examination?

6 MR. VOLPE: I just have one question,
7 Your Honor.

8 **CROSS-EXAMINATION**

9 **BY MR. VOLPE:**

10 Q. Mr. Hilsher, isn't it true that when the
11 Oklahoma Legislature passed the Oklahoma Registered
12 Poultry Feeding Operations Act, that it followed the
13 recommendation of Governor Keating's Animal Waste Task
14 Force to then follow the U.S. Department of
15 Agriculture, Natural Resource Conservation Service's
16 guidelines for the proper collection and storage and
17 disposal of animal waste? Isn't that what happened?

18 MR. GARREN: Objection, Your Honor.
19 This is exactly where we were cut off in asking
20 questions about what the task force did and the
21 reasons for it. We're obviously looking at historical
22 information again. That was the basis for us being
23 outside of that. I'd ask that the objection be
24 sustained.

25 MR. VOLPE: I'm asking, Judge, when the

1 Oklahoma Legislature passed the Registered Poultry
2 Feeding Operations Act whether it followed the
3 recommendations of the task force.

4 THE COURT: Well, if I allow you to do
5 that, then we need to allow Mr. Garren to ask the
6 questions he wished to ask about the recommendations
7 as well. Sustained.

8 MR. VOLPE: Then I'll withdraw my
9 question.

10 THE COURT: All right. Mr. Garren, come
11 back up.

12 MR. WEEKS: I do have a question, Your
13 Honor. If I could.

14 THE COURT: All right. Go ahead.

15 **CROSS-EXAMINATION**

16 **BY MR. WEEKS:**

17 Q. Mr. Hilsher, my name is Gary Weeks and I'm
18 one of the lawyers in this case and I represent
19 George's. I just had a couple of questions, if I may.

20 I understood you to testify that the Oklahoma
21 Scenic Rivers Commission had no authority to regulate
22 the land application of poultry litter in the Illinois
23 River Watershed; is that correct?

24 A. That's what I said.

25 Q. Okay. Which Oklahoma agency does have the

1 authority to regulate the land application of poultry
2 litter in the Illinois River Watershed?

3 MR. GARREN: Objection; foundation.

4 THE COURT: Sustained. Rephrase.

5 Foundation.

6 Q. (BY MR. WEEKS) Mr. Hilsher, do you know
7 which Oklahoma agency has the authority to regulate
8 the land application of poultry litter in the Illinois
9 River Watershed?

10 A. The Department of Agriculture.

11 Q. Okay. Good. Thank you. And I just wanted
12 to ask too: I understood you to say there was a time
13 in 1974 to 1976 that you lived on or near the Illinois
14 River; is that correct?

15 A. That's right.

16 Q. Okay. And that you left Oklahoma at that
17 time and the next time you saw the river was in 1998;
18 correct?

19 A. I think we're talking about being in as
20 opposed to being at.

21 Q. Okay.

22 A. I may have been at the river, but the next
23 time I was looking at the river --

24 Q. Right.

25 A. -- observing the river for these issues --

1 Q. Right.

2 A. -- would have been that '97-'98 time frame as
3 part of the task force.

4 Q. I understand. And then as I understood your
5 testimony, the next time that you had the opportunity
6 to look at the river was either in the fall of 2008 or
7 the spring of 2009; is that correct?

8 A. During the time that I was on the Scenic
9 River -- no, I don't think that's correct. When I'm
10 on the Scenic Rivers Commission from '98 to 2009, I go
11 by the river all the time. In terms of getting down by
12 the river, I believe I told you that in -- oh, two or
13 three years ago we were down at Achota Bend looking at
14 a sampling -- I may not have said "Achota Bend" -- but
15 we were looking at a sampling that was taking place
16 then. Either in the spring or the fall I was at one
17 of the Scenic Rivers Commissioner's homes. That would
18 have been in 2008, 2009. And I was on the river then.
19 As in on the river being right next to it.

20 Q. Right. And so it was on that basis that you
21 were able to compare and contrast the condition of the
22 river when you first saw it in '74 to '76 and then
23 subsequently saw it again in '98; correct?

24 A. Right.

25 Q. And you compared that for Mr. Garren about

1 the water quality conditions, and then you again made
2 that comparison again in 2008; is that correct?

3 A. Correct.

4 Q. When you were next on the river or at the
5 river?

6 A. Well, I guess it was actually probably 2006
7 when I was at Achota doing sampling.

8 Q. Okay.

9 A. Not 2008, 2009.

10 Q. Now, when were you appointed to the Oklahoma
11 Scenic Rivers Commission?

12 A. 1998.

13 Q. Okay. So would it be fair to fair to say,
14 sir, that while you were a member of the Oklahoma
15 Scenic Rivers Commission saw the river in 1998 and
16 then you did not see it again until 2006?

17 A. Not to -- not but -- just to go by it, but
18 not to get down in it or on it.

19 Q. So as the chairman of the Scenic Rivers
20 Commission for eight years, you never took time to go
21 down and take a look at the river. Is that what
22 you're telling us?

23 A. That's right.

24 MR. WEEKS: No further questions, Your
25 Honor.

1 THE COURT: Any further
2 cross-examination?

3 Mr. Garren.

4 **REDIRECT EXAMINATION**

5 **BY MR. GARREN:**

6 Q. Mr. Hilsher, you indicated that money was
7 used to buy conservation easements. Do you remember
8 that testimony?

9 A. Yes.

10 Q. What's the purpose?

11 A. Actually, it's a lease of an easement. Lease
12 of an easement.

13 Q. All right. What's the purpose of purchasing
14 or leasing a conservation easement?

15 A. Well, it's to create a buffer zone. Because
16 what happens with these cow pastures is, the trees and
17 the brush are taken off the property to grow hay.
18 When it's cleared all the way to the river, there's
19 nothing to protect the stream banks so stream banks
20 are lost. There's nothing to prevent whatever is
21 flowing downhill in terms of runoff to slow that.
22 There's no tall grass, there's no trees, there's no
23 root system to hold that stuff in. So that's the
24 purpose, is to take it out of hay production and
25 create a buffer.

1 THE COURT: How wide are the easements
2 you lease?

3 THE WITNESS: You know, I'm thinking
4 it's either between 100 -- 100 feet off the river.
5 Could be 300. Ed Fite would have a better idea of
6 exactly the feet off the river, Judge.

7 THE COURT: One of the things I've
8 noticed when I've been down there is that oftentimes
9 you'll have a buffer, but then you'll have a slough
10 running back from the river and there will not be a
11 buffer around that slough.

12 Ever address that situation?

13 THE WITNESS: We have not. Judge, in
14 terms of -- I have not. Now, what happens in the
15 course of negotiating these buffer zones or riparian
16 areas, Ed Fite is the guy on the ground, he's talking
17 to the landowner. You know, he comes out with
18 the -- with the lease term, or in some instances,
19 we'll -- we may see a map of it. But the
20 commissioners themselves don't go out and say, well,
21 you need to go up the slough another 100 feet or back,
22 you know, 50 feet.

23 THE COURT: Mr. Fite attends to those
24 details?

25 THE WITNESS: Yes, Your Honor.

1 THE COURT: All right. Mr. Garren.

2 MR. GARREN: I have no other questions,
3 Your Honor.

4 THE COURT: Cross -- or recross.

5 MR. VOLPE: Nothing, Your Honor.

6 MR. ELROD: No, Your Honor.

7 MR. WEEKS: Nothing further, Your Honor.

8 THE COURT: Very well. You may step
9 down. The state may call its next witness.

10 MR. GARREN: May I step out for a
11 minute, Judge?

12 *(Discussion held off the record)*

13 THE COURT: Mr. West, I would be remiss
14 if I didn't say welcome.

15 MR. WEST: Thank you, Your Honor.

16 THE COURT: Good to see you, sir.

17 **EDWARD FITE, III,**
18 ***after having been first duly sworn, says in reply to***
19 ***the questions propounded as follows, to-wit:***

20 THE COURT: State your full name for the
21 record, please

22 THE WITNESS: Excuse me?

23 THE COURT: State your full name for the
24 record, please.

25 THE WITNESS: Edward Halsell Fite,

1 III.

2 THE COURT: And the middle name? I'm
3 sorry.

4 THE WITNESS: H-a-l-s-e-l-l.

5 THE COURT: Thank you. Mr. Garren.

6 MR. GARREN: Thank you, Your Honor.

7 **DIRECT EXAMINATION**

8 **BY MR. GARREN:**

9 Q. Mr. Fite, tell the court what your current
10 employment is.

11 A. Administrator for the Oklahoma Scenic Rivers
12 Commission.

13 Q. And how long have you been such an
14 administrator?

15 A. Approximately 26 years.

16 Q. Where do you currently live?

17 A. 15307 North Swannanoa Road.

18 Q. Where is that located, sir?

19 A. Tahlequah, Oklahoma.

20 Q. How close to the river is that?

21 A. My home is approximately a quarter mile from
22 the river.

23 Q. Do you have land adjoining the actual
24 Illinois River?

25 A. Yes.

1 Q. And how long have you owned that land?

2 A. It's been in my family since approximately
3 1905, 1906.

4 Q. And you've lived how long on that property?

5 A. Since March 1st of 1982.

6 Q. Did you access or visit that property before
7 you lived on it in 1982?

8 A. Yes.

9 Q. And tell the court what were the
10 circumstances for that occurring.

11 A. Visiting my grandparents when they were
12 recreating there, going to the river to float, fish,
13 camp, hunt.

14 Q. Let's talk a little bit about your education.
15 Where did you go to high school?

16 A. Muskogee, Oklahoma. Muskogee High School.

17 Q. Did you attend college?

18 A. Yes, sir.

19 Q. Where?

20 A. I attended Oklahoma State University.

21 Q. And did you --

22 A. Concord College in Athens, West Virginia, and
23 Northeastern State University in Tahlequah.

24 Q. And did you observe a degree?

25 A. Yes, sir.

1 Q. And at which institution?

2 A. Northeastern State University.

3 Q. And what is that degree?

4 A. Accounting with a business minor.

5 Q. Okay. Are there other -- are there other
6 educational or certification diplomas, evidence of
7 educational experiences, obtained by you at any time?

8 A. Yes.

9 Q. And tell the court generally what those might
10 be.

11 A. I'm a federally-accredited floodplain
12 manager. I also teach swift-water rescue for law
13 enforcement, fire service, and emergency medical
14 services.

15 Q. Have you participated in classes, other than
16 those that would have resulted in a degree or further
17 certification, in the area of your job duties?

18 A. Yes.

19 Q. Can you tell the court generally what those
20 may be?

21 A. I've attended classes by Dr. David Roskin on
22 applied fluvial geomorphology techniques. I've been
23 involved in an array of different curriculum related
24 to rivers and have participated up until the mid to
25 late 1980s -- excuse me; strike that -- the mid to

1 late 1990s with the National Association of State and
2 Local River Conservation Programs.

3 After that, the organization combined with
4 the American River Management Society, which are the
5 federal agencies that oversee or manage the federal
6 wild and scenic rivers program, and the two programs
7 merged and now it's River Management Society and have
8 participated there.

9 Have participated with the American
10 River -- excuse me -- American Water Resources
11 Association, which is a collective group of folks that
12 work on water issues throughout the United States.

13 Q. Where is that association headquartered or --

14 A. I'm not real sure where that is.

15 Q. Where do they conduct their meetings --

16 A. The meetings move around the United States.

17 Q. How often do you attend those?

18 A. I have only attended a couple of their
19 meetings. Most generally, I read their journals.

20 Q. All right. Have you had any course
21 presentations from a gentleman -- or let me ask you
22 this.

23 Have you had any course presentations with
24 regard to water quality issues?

25 A. Yes.

1 Q. Can you tell the court generally what those
2 are?

3 A. Well, there's been an array of those,
4 Mr. Garren. In 26 years, I have learned things that I
5 believe you would not find in a college setting just
6 through the osmosis of my day-to-day job, attending
7 conferences, and working with different professionals
8 across the United States.

9 Q. Did you attend the Governor Clinton Animal
10 Waste Task Force?

11 A. I did not.

12 Q. Did you have knowledge of its existence?

13 A. Yes.

14 Q. Have you been provided any information or
15 data that was generated out of that task force?

16 A. Yes.

17 Q. What time frame was that -- would that have
18 been that you would have obtained that information?

19 A. I received a copy of the recommendations from
20 that task force. I believe the task force convened in
21 1990 and consummated their work in 1993, and I
22 received a copy of that report from Claud Rutherford,
23 was my earliest receipt of that.

24 Q. Did you read it?

25 A. Yes, sir.

1 Q. Have you participated in what's referred to
2 as the Oklahoma Arkansas River Compact Commission
3 meetings?

4 A. Yes.

5 Q. And what generally -- what time frame are we
6 talking about?

7 A. Being throughout my career, generally the
8 Compact would meet in September of each year, once a
9 year.

10 Q. And have you attended those meetings
11 frequently or regularly?

12 A. Most annually, yes. There have been a couple
13 that I have missed.

14 Q. What is the -- what was the purpose behind
15 the Compact Commission, if you know?

16 A. The compact, I believe, was negotiated in
17 1970 and it was to -- between Arkansas and Oklahoma --
18 to administer the appropriation of water within the
19 Arkansas River basin.

20 Q. Does that particular commission gather data
21 and publish any reports to your knowledge?

22 A. Yes.

23 Q. And have you participated in that gathering
24 of data and publishing of reports?

25 A. I participated in discussions with the

1 Compact. As far as actively a participant in writing
2 a document, no.

3 Q. All right. Have you had an opportunity to
4 comment on the documents that were, in fact,
5 published?

6 A. Yes.

7 Q. Have any of your comments been accepted?

8 A. Yes.

9 Q. Has the Compact done anything to solve
10 nonpoint-source pollution to your knowledge?

11 A. No. Other than the adoption of some
12 resolutions and some instructions to state agencies
13 participating.

14 Q. All right. Let's talk a little bit about
15 symposia, conferences, and workshops that you may have
16 attended.

17 I believe you mentioned -- and correct me if
18 I'm wrong -- the national, state, and local River
19 Managers Association?

20 A. Yes.

21 Q. And have you attended that?

22 A. That organization no longer exists.

23 Q. What is it now?

24 A. It is the River Management Society.

25 MR. VOLPE: Excuse me, Mr. Fite. Excuse

1 me. Judge, I'm not sure what we're doing here.
2 Sounds like we're qualifying an expert witness. I
3 mean, I'm sure Mr. Fite has had a storied career, and
4 hopefully it will continue, but I'm not sure this
5 symposiums and what he's read and what he's commented
6 on is relevant to any issue that he's competent to
7 testify about.

8 THE COURT: Mr. Garren.

9 MR. GARREN: Well, Your Honor, obviously
10 it is because Mr. Fite has a great deal of experience
11 on the river. He obtains data and information. I'm
12 trying to establish that even though he has a degree.
13 A nonscientific degree, that he has information that
14 gives him the ability to read, digest, and conclude
15 from data information that assists him in his
16 occupation and profession, and in particular, giving
17 guidance to the Scenic Rivers Commission relative to
18 water quality issues that may occur. I'm trying to
19 establish that's what he needs to do in his job.

20 MR. VOLPE: Well, Judge, that sounds an
21 awful lot like expert testimony, and to the extent
22 it's not expert testimony, it certainly is opinion
23 testimony. Mr. Fite has not been disclosed as an
24 opinion witness. He's a fact witness.

25 THE COURT: All right. And

1 specifically, what has he been disclosed to testify
2 about?

3 MR. GARREN: He's a fact witness, Your
4 Honor. We've not disclosed him as a nonretained
5 expert.

6 THE COURT: All right.

7 MR. GARREN: We can ask him -- I'm
8 sorry.

9 THE COURT: I think it is pertinent to
10 have this background. On one hand. You know, someone
11 may live and grow up around the river and know a lot
12 about it. And this testimony goes to show that
13 Mr. Fite not only knows the river, but has involved
14 himself in the River Management Society, etcetera.

15 The objection's overruled. Obviously, the
16 question is, how far do you expect that to go, and
17 we'll just have to see.

18 MR. GARREN: We'll try and pick it up,
19 Your Honor.

20 Q. (BY MR. GARREN) Does the River Management
21 Society compile data and issue reports or memoranda;
22 do you know?

23 A. Yes.

24 Q. And have you been privy to that information,
25 sir?

1 A. Yes.

2 Q. And how long did you say you were a
3 participant in that society that merged from a
4 previous society?

5 A. Since the merger in the late 1990s.

6 Q. All right.

7 A. Mid 1990s. Excuse me.

8 Q. Did you participate in the association prior
9 to its merger?

10 A. Yes. We had joint meetings.

11 Q. All right. Have you ever attended any
12 National Poultry Waste Management Symposiums?

13 A. Yes.

14 Q. And how many have you attended?

15 A. Two.

16 Q. And when were they?

17 A. Don't remember the actual dates, but they
18 were in Arkansas.

19 Q. Would '98 -- or 1998 and 2006 be an accurate
20 description of the time periods?

21 A. I believe so, yes, sir.

22 Q. They were both presented in Arkansas; is that
23 correct?

24 A. Yes, sir.

25 Q. All right. Did you attend all of those

1 meetings when they were being conducted in both of
2 those occasions?

3 A. Not all of the meetings, no, sir.

4 Q. Were you there fairly regular as to the
5 meetings that were being presented?

6 A. I believe so, yes.

7 Q. Let me ask you this, sir.

8 Did you have an opportunity to meet and see
9 people who also attended at those symposiums?

10 A. Yes.

11 Q. And did you observe any poultry
12 representatives, poultry industry representatives in
13 particular, any of those that might be representatives
14 to the defendants in this case?

15 A. Yes.

16 Q. And can you tell the court the names of those
17 company representatives that you observed at one or
18 more of those symposia?

19 A. That's been -- there have been so many
20 meetings, Mr. Garren, where I've met with poultry
21 representatives during my career that I might speak
22 out of turn. But I do know that they were there.
23 Specifically who was at what meeting, I couldn't say.

24 Q. When you say you know they were there, who
25 are you referring to?

1 A. I'm sorry. Poultry companies that are
2 being --

3 Q. And what poultry companies in particular, if
4 you can recall?

5 A. It would have been Simmons and Tyson's, most
6 likely Cargill, some of those that I'm familiar with
7 that operate in the Illinois River basin.

8 Q. Do you know a gentleman by the name of Gary
9 George?

10 A. Yes, sir.

11 Q. And how do you know him?

12 A. He's an individual that I've talked to on a
13 number of occasions about different processes within
14 the poultry industry.

15 Q. Is he connected to the company that is
16 George's, Inc. that's a defendant in this case?

17 A. Yes.

18 Q. And how do you know his connection -- or do
19 you know what his connection is?

20 A. I believe he's the owner.

21 Q. All right. Did you attend a conference
22 called "Focus on Phosphorus" in 1993?

23 A. I did not.

24 Q. Were you aware of its -- were you aware of a
25 publication arising from that?

1 A. Yes.

2 Q. And did you obtain a copy of that?

3 A. Yes.

4 Q. And did you use it, or have you used it, in
5 executing your duties and responsibilities for the
6 Scenic Rivers Commission?

7 A. Yes.

8 Q. And in what way would you do that?

9 A. I -- I actually used that document during the
10 Animal Waste Task Force and Water Quality Protection
11 Task Force -- excuse me -- for Governor Keating in
12 1997 here in Oklahoma. That was one of the documents
13 that I used.

14 Q. And how did you use it?

15 A. Just reference material.

16 Q. Mr. Hilsher recently testified that there
17 were various defendants, or representatives of the
18 various defendants, in this lawsuit attending one or
19 more meetings at that task force.

20 Do you recall that same fact?

21 A. Yes, yes.

22 Q. Do you recall the names of any persons that
23 you observed at the Keating task force meetings?

24 A. Mark Simmons, Archie Schaffer, Bill Mueller
25 from Tyson. There were others.

1 Q. Are you familiar with an organization called
2 the Arkansas Water Resource Center?

3 A. Yes.

4 Q. And tell the court what that is.

5 A. The Arkansas Water Resource Center is a -- is
6 a quasi-University of Arkansas organization that
7 focuses on water issues in the state of Arkansas.

8 Q. Have you presented at that Water Resource
9 Center there in Arkansas?

10 A. Yes.

11 Q. And tell the court what it is you presented
12 there.

13 A. I presented a -- I think that I've spoke to
14 them twice. Once was on the history of the Illinois
15 River, some of the issues, and the -- one was on
16 phosphorus and other issues affecting the river.

17 Q. Who was the subject or the parties interested
18 or attending that particular presentation on
19 phosphorus? Who was it geared to present to?

20 A. It was geared towards academia, it was geared
21 towards lake groups, river groups. It was targeted
22 towards poultry and animal issues.

23 Q. Were any poultry defendants' in this case
24 representatives in attendance at either of your
25 presentations in the Water Resource Center?

1 A. Yes.

2 Q. Can you name any of them?

3 A. I presented at a -- as I recall, I presented
4 at one in Little Rock and John Elrod was there and he
5 also spoke.

6 Q. When he spoke --

7 MR. ELROD: It was a good speech too,
8 Your Honor. Was it a good speech.

9 Q. (BY MR. GARREN) When you spoke at the Water
10 Resource Center on phosphorus, what was the general
11 subject matter in which you spoke about?

12 A. As I recall, I talked about the history of
13 the Illinois River, but I got into discussions about
14 point source and nonpoint source issues. Cited some
15 of the data that had been -- some of the data results
16 from United States Geological Survey sampling.
17 Illinois River basin, some of the data points that
18 came from the beneficial use monitoring program that
19 is administered by the Oklahoma Water Resources Board
20 and other issues that would present a general
21 understanding to the public that I was speaking to --
22 or the group I was speaking to about the Illinois
23 River and scenic rivers at large.

24 Q. Have you made other preparations to other
25 groups involving the Illinois River Watershed?

1 A. Yes.

2 Q. Just give a quick list, if you would, for the
3 court what those presentations would be and who would
4 be the attended audience.

5 A. Well, I have spoken at the national level to
6 the River Management Society about Oklahoma's river, I
7 have -- rivers -- I have been very active in the
8 Department of Interior's Interagency Wild and Scenic
9 Rivers Coordinating Council as the only state
10 representative for a few years. So I had the
11 opportunity to represent all the states that had state
12 and local river programs.

13 I have presented in Arkansas to the Arkansas
14 Environmental Law Review. I have spoken to the
15 Arkansas Farm Bureau on a couple of occasions. Spoken
16 to a litany of many folks here in Oklahoma, different
17 groups, across the state.

18 Q. Have you ever been invited to guest lecture
19 at any universities?

20 A. Yes.

21 Q. And what universities and what would be the
22 subject?

23 A. I have spoken in Texas, Arkansas, Oklahoma.

24 Q. At various universities?

25 A. Oklahoma University, Oklahoma State

1 University, University of Arkansas, University of
2 Texas proceedings in Austin. I'm trying to think.
3 There's other universities but I'm --

4 Q. In your job and duties as administrator of
5 the Scenic Rivers Commission, do you rely on
6 information from other agencies, whether state or
7 federal, to perform your tasks?

8 A. Yes.

9 Q. What kind of agencies do you look to to
10 receive information that's useful for that purpose?

11 A. For the most part, I try to -- anytime
12 there's a publication that's related to water quality
13 or techniques or programs that would avail themselves
14 to Oklahoma to do a better job in the preservation and
15 protection of scenic rivers in our state, I try to
16 access that information and read it. And understand
17 it.

18 Q. And during this case, sir, the defendants and
19 the state visited your Scenic Rivers Commission
20 office, did they not?

21 A. Yes.

22 Q. Do you, sir, throw anything away when you've
23 collected it for purposes of reading and using it in
24 your work?

25 A. I think you should ask John Elrod and his

1 team. He'll tell you no.

2 Q. Do you constantly refer to materials that
3 have been produced and published --

4 A. Yes.

5 Q. -- that are relative to your job functions?

6 A. Yes.

7 Q. Do you know a gentleman by the name of Martin
8 Maner?

9 A. Yes.

10 Q. How do you know him?

11 A. Martin and I have been friends for many
12 years. He was water quality representative for the
13 old Arkansas Department of Pollution Control and
14 Ecology and was headquartered out of
15 northeast -- excuse me -- northwest Arkansas. And
16 during the ramping up to the U.S. Supreme Court case
17 on the Fayetteville issue, I had an opportunity to
18 interact with Mr. Maner many, many times. And we
19 became friends and have discussed and debated issues
20 for many years.

21 Q. Are you familiar with a paper that he
22 prepared with regard to phosphorus in the Illinois
23 River Watershed area?

24 A. I believe he wrote a paper in 1988 about
25 that. And he cited quite extensively about the issues

1 that were impacting the water quality within Benton
2 and Washington Counties in Arkansas.

3 MR. GARREN: May I approach the witness,
4 Your Honor?

5 THE COURT: You may.

6 Q. (BY MR. GARREN) I hand you Exhibit No. 3312
7 of the state. Do you recognize that document?

8 A. Yes, sir.

9 Q. Tell the court what that document is by first
10 describing the title.

11 A. Agricultural land use, nutrients, and water
12 quality in Benton and Washington Counties, by Martin
13 Maner, P.E., Arkansas Department of Pollution Control
14 and Ecology. March 1988.

15 MR. GARREN: Judge, we've handed up some
16 folders with those exhibits in them, if you wish to
17 reference those.

18 THE COURT: I can. I'm just trying to
19 see if there's an objection to it.

20 MR. ELROD: Your Honor --

21 THE COURT: Just one second. All right.
22 Yes, sir.

23 MR. ELROD: It very well may be that
24 this paper comes in but not through this witness.
25 It's authored by Dr. Martin Maner. His deposition was

1 taken. His deposition is going to be read, and that
2 would be the appropriate time to interpose objections
3 to it all. But trying to authenticate it and bring it
4 in through this particular witness we think is
5 improper.

6 MR. VOLPE: It's hearsay, Judge.

7 THE COURT: Yeah. Sustained. We don't
8 really need to waste our time in this type of
9 effort --

10 MR. GARREN: That's not what the purpose
11 is for. It's a submission to him, Your Honor. I
12 haven't even asked a question about it. So these
13 peremptory objections when I haven't asked the
14 question are kind of difficult to respond to.

15 THE COURT: Well, it's coming in through
16 this witness. So go ahead.

17 MR. GARREN: I have no intentions of
18 offering it through this witness, Your Honor. I just
19 want to ask him a couple of questions about it.

20 THE COURT: Let's see. Go ahead.

21 Q. (BY MR. GARREN) Did you have an opportunity
22 to discuss the contents of this document with
23 Mr. Maner at any time?

24 A. Yes.

25 Q. And having discussed that with him, what, if

1 anything, did you do with this paper?

2 A. Martin and I discussed this paper, but we
3 also specifically discussed why he came to this paper.

4 MR. VOLPE: I'm going to object, Judge.
5 What Mr. Maner and Mr. Fite discussed is hearsay.

6 THE COURT: Well, to the extent it were
7 to reveal the content of this unadmitted document, it
8 would be. I suspect we're going to the substance;
9 correct

10 MR. GARREN: No.

11 THE COURT: All right. Overruled.
12 Let's --

13 Q. (BY MR. GARREN) As a result of your
14 discussion with Mr. Maner, what did you do with this
15 paper?

16 A. I disseminated it to others.

17 Q. And can you tell the court who may have been
18 a recipient of this paper on your behalf?

19 A. At the time it would have been the Department
20 of Health for the State of Oklahoma, and that agency
21 predated the present-day Oklahoma Department of
22 Environmental Quality. It would have gone to the
23 chief of the water quality division at the Water
24 Resources Board. I know I gave it a copy of it to Ron
25 Suttles who is now retired and was chief of the

1 national resources section for the Department of
2 Wildlife Conservation in the state. And I'm certain
3 that I probably gave a copy to the Attorney General's
4 Office, to our liaison within that office.

5 Q. Do you know a gentleman by the name of Jerry
6 Barker?

7 A. I do. Quite well.

8 Q. What does he do or what is his position?

9 A. He works at the Department of -- oh, it's
10 called now the Oklahoma Department of Agriculture,
11 Food and Forestry.

12 Q. And did you share that document with him?

13 A. Yes.

14 Q. Did you share it with a gentleman by the name
15 of Jim Curtis?

16 A. I believe Jim probably got his copy from
17 Jerry.

18 Q. All right. And is there a gentleman by the
19 name of Sancho Dickerson that you know?

20 A. Sancho Dickerson, yes.

21 Q. And where does he work? What does he do?

22 A. Same agency.

23 Q. And did you distribute a copy to him?

24 A. I think it went directly to Jerry.

25 Q. All right.

1 A. Now, there were a lot of times, Mr. Garren,
2 that Sancho and Gary would come to my office together.
3 I may have given it to them collectively. That's a
4 question they'd have to answer.

5 Q. Did you ever an opportunity to discuss the
6 contents of this paper with any other people?

7 A. Yes.

8 Q. In what setting or context would that occur?

9 A. Generally, when I -- may I digress and depart
10 for just a second to tee up what I want to tell you?

11 This particular issue that Dr. Maner came up
12 with in '88 was during the time that we were engaged
13 in point source issues in the Illinois River basin.
14 But we were beginning to talk about nonpoint-source
15 pollution in the Illinois River --

16 Q. When you say "we," who are you talking about?

17 A. The State of Oklahoma.

18 Q. All right.

19 A. And the State of Arkansas.

20 Q. All right.

21 A. We had focused all of your attention on
22 wastewater treatment plants, point-source dischargers,
23 places where you can go to a discernible site and see
24 the outfall from a pipe or a ditch that's carrying
25 effluent or treated wastewater.

1 And as we were going through the process with
2 the Fayetteville case, and for that matter with the
3 City of Tahlequah -- City of Tahlequah was trying to
4 build a new wastewater treatment plant to increase
5 their discharge into the Illinois River -- we began to
6 focus on nonpoint-source pollution issues as well.

7 We realized -- we, the State of Oklahoma,
8 realized in the 1980s that when we got through the
9 administrative processes with doing what needed to be
10 done to deal with Tahlequah's wastewater treatment
11 plant and to resolve what was going on with the
12 Fayetteville issue, we knew at the end of those
13 avenues that we were going to have to come back and
14 start focusing on nonpoint-source pollution. Because
15 point source, we'd spent many, many dollars on trying
16 to correct that, and we weren't catching up on the
17 pollutants. And we knew we were going to have to
18 focus than

19 Q. How did you know you weren't catching up on
20 the pollutants?

21 A. Because of the monitoring.

22 Q. And who was doing the monitoring?

23 A. Back then our agency had been monitoring, the
24 state health department had been monitoring, Water
25 Resources Board had been monitoring, and others.

1 Q. How was that monitoring occurring?

2 A. It was to grab samples at my agency on a
3 monthly basis at a number of sites.

4 Q. And were those samples then tested?

5 A. Yes.

6 Q. And where did the test results go when they
7 were concluded?

8 A. The state Health Department would run the
9 tests for us and those samples would come back to your
10 agency, but they also went on the STORET program that
11 USEPA monitors or maintains, and all the agencies,
12 whether it be the State of Oklahoma or Arkansas, can
13 get into that information.

14 Q. Is that data publicly available that you just
15 referred to?

16 A. Yes, sir.

17 Q. Is that data that you referred to in the
18 performance of your job and duty functions as the
19 Scenic Rivers chairman?

20 A. Restate that, please.

21 Q. Do you -- let me ask it this way.

22 Do you rely on or use or utilize in any way
23 that publicly-stored data, monitoring data, in the
24 performance of your functions as the chairman of the
25 Scenic Rivers Commission?

1 A. Yes.

2 Q. Have you, yourself, ever been published,
3 sir?

4 A. Yes.

5 Q. And what was the subject of the paper and
6 where was it published?

7 A. It was published by Dr. Soerens and I
8 participated in a paper with him and -- I'm trying to
9 remember what year that was. But --

10 Q. About 2003?

11 A. Approximately early 2000.

12 Q. What was the nature of the subject of that
13 paper?

14 A. It had to deal with nutrients in the Illinois
15 River basin.

16 Q. And what did you do in participating in the
17 preparation of that paper?

18 A. I consulted with Dr. Soerens and his
19 associate and provided information to them and
20 collaborated with them on pulling together that
21 report.

22 Q. Were there any conclusions drawn from that
23 study?

24 A. Yes.

25 Q. And can you tell the court generally what

1 they were?

2 MR. HOPSON: Objection, Your Honor.

3 That is clearly hearsay.

4 THE COURT: Sustained.

5 Q. (BY MR. GARREN) Did you participate in the
6 study, Mr. Fite?

7 A. I participated with Dr. Soerens in compiling
8 the report, yes.

9 Q. And did you have firsthand knowledge of the
10 information that went into that report?

11 A. Yes.

12 Q. And is your name on the paper that described
13 the conclusions that I just asked you about?

14 A. Yes.

15 Q. And do you know what those conclusions are?

16 A. Yes.

17 Q. And can you tell the court what they are?

18 MR. VOLPE: Objection, Your Honor. That
19 is hearsay.

20 THE COURT: Improper foundation. I
21 mean, if he did the data collection, then perhaps.
22 But having collaborated with a scientist and having
23 his name on the report does not allow him to testify
24 as an expert here. He's not identified as an expert
25 witness. He's a fact witness. The objection's

1 sustained.

2 MR. ELROD: Your Honor, Ms. Bronson also
3 tells me, Your Honor, that using this would be a
4 violation of the 72-hour rule because it was not
5 disclosed to us --

6 *(Discussion held off the record)*

7 THE COURT: Well, Mr. Elrod, I don't
8 know if it's your Arkansas accent, but our court
9 reporter can't understand you, sir.

10 MR. ELROD: I didn't know I had an
11 accent, Judge. The 72-hour rule that we've all agreed
12 to, the court has agreed to, this particular document,
13 I'm advised by Ms. Bronson, is not on that list from
14 this witness.

15 MR. GARREN: I'm not even using the
16 document. I'm simply trying to establish that this
17 gentleman has some other experiences in other areas
18 and how he's used that experience.

19 THE COURT: Well, I think you're going
20 beyond that. He clearly has experience in other
21 areas. But as to the scientific conclusions, the
22 objection's sustained. Go ahead.

23 MR. GARREN: All right.

24 Q. (BY MR. GARREN) Let's talk again about the
25 property you own on the Illinois River Watershed, sir.

1 Do you run any cattle on that property?

2 A. I personally do not.

3 Q. Is there cattle on the property?

4 A. Yes.

5 Q. And why is that?

6 A. I lease to an individual.

7 Q. And how much property is there leased?

8 A. Approximately 100 acres that's leased to this
9 person.

10 Q. How many cattle does he run there; do you
11 know?

12 A. According to my farm plan with the
13 Conservation Commission, he has 20 bulls, rodeo-stock
14 bulls, in one field -- that comprises approximately 50
15 acres -- he has approximately 15 head of yearlings in
16 one pasture, and has approximately 20 heifers in
17 another pasture.

18 Q. Have you ever been a poultry-grower,
19 Mr. Fite?

20 A. No.

21 Q. Have you ever used poultry waste on the land
22 that you own there in the Illinois River Watershed
23 area?

24 A. No.

25 Q. Has there been a past occasion for poultry

1 waste to have been applied on that property?

2 A. Yes.

3 Q. And what was the purpose of that?

4 A. Rainfall simulator demonstration by Oklahoma
5 State University and then some work by the University
6 of Arkansas.

7 Q. All right. Do you know what the source of
8 the feed is that is provided to the cattle that are
9 run on your property?

10 A. Yes.

11 Q. And generally what is that?

12 A. Either cattle cubes or hay.

13 Q. All right. And is hay brought into your
14 property at any time for feeding those cattle?

15 A. Yes.

16 Q. And do you know the source of that hay at any
17 time?

18 A. Excuse me?

19 Q. Do you know the source of that hay?

20 A. Yes.

21 Q. And can you tell the court what you know the
22 source to be?

23 A. Be from areas where poultry waste has been
24 land-applied.

25 Q. How do you know that?

1 A. I've seen it applied.

2 Q. And you know that's where it's been hayed?

3 A. Some of the hay.

4 Q. All right. Let's talk a little bit about the
5 historical physical description of the Illinois River
6 that you might remember as a younger person.

7 Did you have an opportunity to play or
8 recreate in the Illinois River Watershed?

9 A. Yes.

10 Q. Have you ever swam in the river?

11 A. Yes.

12 Q. And how old were you when you recall an event
13 at the river when you were a child?

14 A. Been several of them. But one in particular
15 that stands out to me is when I was approximately five
16 years of age.

17 Q. And tell the court briefly what happened on
18 that event.

19 A. It was a fall afternoon. I was with my
20 grandfather, Dr. Halsell Fite, my father, and my
21 uncle, Coleman Fite, and we were walking adjacent to
22 the river. A little bluff area that I own that
23 overlooks the river.

24 And I, as all these other men in this room
25 probably recall, had a pair of pot metal with

1 white-handled cap guns, and I accidentally dropped one
2 into the river. I remember seeing that gun to this
3 day laying there on the bottom of that stream. The
4 water's crystal clear, the gravels were just like they
5 were six inches deep.

6 And after my father spanked me, he left me in
7 the care of my grandfather and my uncle, and my father
8 went down this declining bluff area and took off their
9 clothes, and I remember it quite well because they got
10 down to their underwear and their T-shirts, and they
11 went out to retrieve my gun in what appeared to me
12 from the bluff to be just a few inches. They had to
13 dive down under the water to get the gun.

14 Q. Are you familiar with that location today --

15 A. Yes.

16 Q. -- or since then?

17 A. Yes.

18 Q. Do you know approximately how deep that water
19 was or is even at a later time?

20 A. It's approximately -- depending on scour at
21 the time, I would say it was probably over six feet
22 because they had to dive under the water, go
23 completely submerged, to get to the gun.

24 Q. And did you have any other experiences as a
25 child diving into the water at the Illinois River?

1 A. Oh, yes.

2 Q. How would you describe the waters and
3 approximately when would those be?

4 A. Retrieving -- we would throw quarters in the
5 water, retrieve those. We would pick up beer cans and
6 Coke cans and occasionally lose a lure while fishing
7 or drop something in the water and be able to go and
8 retrieve it.

9 Q. Do you visit that same location where your
10 cap gun sunk below the surface of the water?

11 A. Yes.

12 Q. And where is that generally?

13 A. I own the property so I go there
14 frequently.

15 Q. All right. How would you describe the
16 general nature and the quality of the water that you
17 observe today as compared to what you remember seeing
18 as a young child?

19 A. Funny that you ask that question. I was
20 there yesterday evening and took a reporter that's
21 doing a piece on Tahlequah, wanted to go to the river.
22 So we went to the area and I looked off that bluff and
23 I couldn't see the bottom of the stream.
24 Water -- water is not clear as it used to be.

25 THE COURT: You were five in what year?

1 THE WITNESS: I believe that would have
2 been '62. '63.

3 MR. GARREN: I was getting ready to ask
4 him his age, but you did that much more politically
5 correct, Judge.

6 THE WITNESS: I'm 52.

7 Q. (BY MR. GARREN) As part of your functions in
8 the Scenic Rivers Commission, do you have an
9 obligation in the event a drowning occurs?

10 A. Yes.

11 Q. Tell the court what that obligation is.

12 A. To recover the body and take care of the
13 family's needs.

14 Q. In recent times, have you had to do that,
15 sir?

16 A. Yes.

17 Q. Have there been times when there have been
18 difficulties associated with that?

19 A. Yes.

20 Q. Can you describe to the court what kind of
21 difficulties you've encountered?

22 A. There have been a number of drowning events
23 in my career where individuals have gotten onto the
24 river or have floated the river, swam in the river
25 when the river was above normal flows and have

1 subsequently drowned. And because of water clarity in
2 those events, it's taken several days, on a couple of
3 them, it's taken well over a week to recover the
4 bodies. I wouldn't wish that on anybody in this
5 courtroom to have to do that.

6 But generally water clarity is one of the
7 causations for not being able to immediately recover
8 someone that has drowned.

9 Q. Have you, in fact, located a body in -- well,
10 let me ask you this.

11 What is the depth of the river in which
12 you've located a body that was obstructed due to
13 clarity?

14 A. It depends on the river reach that
15 you're -- would refer to in any of those drownings. I
16 know that I have been involved in over 40 different
17 types of drowning events, from cars being washed over
18 a low-water slab where the mother and children drown,
19 to individuals who were swimming when they shouldn't
20 have been without a personal flotation device. And
21 they range from finding an infant floating in a
22 treetop, to bodies that have been built up gas, are
23 floating on the surface, to bodies that are in 15, 20
24 feet of water.

25 Q. Have you observed -- what's the shallowest

1 depth at which you've had to recover a body that you
2 couldn't see because of water clarity?

3 A. Three to four feet.

4 Q. Do you recall approximately when that was in
5 time?

6 A. Be last summer. At Chewey Bridge, downstream
7 of Chewey Bridge, where the river turns back to the
8 west.

9 Q. Based on your personal observations, would
10 you say that there has been a change or deterioration
11 to the water quality since you've been a child?

12 A. Yes.

13 Q. When did you last tour the basin?

14 A. This past weekend.

15 Q. And what was the reason for doing so?

16 A. I wanted to go and take a thorough look at
17 the Illinois River basin last Saturday and Sunday just
18 so that when I got to court today, that I'd have a
19 fresh recollection of what the river is.

20 Q. Did you have an opportunity to view some
21 videos that I presented to you that was used in
22 opening statements in this case?

23 A. Yes.

24 Q. And tell the court what those videos showed.

25 A. I believe the individual's name was

1 Mr. Duncan, a representative of the Arkansas
2 Department of Wildlife -- or Fish and Game Commission
3 board member, retrieving, I believe in March 23rd of
4 2009, this year -- getting pitchers of water out of
5 the river at different sites.

6 Q. In your tour of the basin, did you visit
7 those same sites that were shown in those videos?

8 A. His sites and more, yes.

9 Q. All right. Let's talk about what you
10 observed in the video with regard to the condition of
11 the river, its flows, and that sort of thing, and
12 compare it to what you just recently observed, if you
13 would, please.

14 A. For this water year, 2008-2009 -- when I
15 refer to "water year," I say water year because the
16 United States Geological Survey reports their water
17 reports or their statistical information on gauging
18 throughout the basin from October 1st through
19 September 30th annually.

20 This has been a very wet year. And
21 Mr. Duncan, when he pulled his samples on the 23rd of
22 March, I remember commenting to you about the clarity
23 of the water. And what has happened this year is
24 we've had a number of runoff events, or what I would
25 call bank-full frequencies, where we're above the

1 hydrograph, we're moving gravels, and thus cleaning
2 the bottom of the stream.

3 And for the last -- since March of 2008,
4 we've had a number of events that have moved a lot of
5 gravel in the Illinois River, and thus the bottom of
6 the stream substrate is very clear. And the rocks are
7 clean.

8 Q. Let's talk a little bit about some of the
9 data that you obtained and review as chairman of the
10 Scenic Rivers Commission. Do you have access to flow
11 data from the river?

12 A. Yes.

13 Q. How's that data compiled or collected?

14 A. At least once a week during the floating
15 season, I provide at Savoy, Arkansas, Arkansas 16,
16 Arkansas 59, U.S. 59 at Watts, Chewey Bridge, Combs
17 Bridge, Tahlequah Bridge, Eldon on Baron Fork at
18 Highway 51, and U.S. 412 on Flint Creek an advisory to
19 the public that I publish weekly at least once.

20 Q. Have you had an opportunity to review the
21 flow data over a period of years?

22 A. Yes.

23 Q. And have you done so recently?

24 A. Yes.

25 Q. And can you describe to the court what kind

1 of flow rates that we -- or you have observed at the
2 river from 2005 or 6 to present; and describe, if you
3 would, what effect that has in the river?

4 A. We had a --

5 MR. VOLPE: Excuse me, sir. I'm going
6 to object. He can -- the first part of the question I
7 don't object to. I object to the second part of the
8 question, which he's going to be offering an opinion
9 drawn from the data.

10 THE COURT: So you don't object to flow
11 rates, but what effect that has had on the river?

12 MR. VOLPE: Exactly.

13 MR. GARREN: And those would be personal
14 observations, Your Honor. That he's familiar with.

15 THE COURT: Obviously, he just testified
16 to the effects of a flow rate. Something that this
17 witness is particularly qualified to testify about.
18 So because you have more knowledge of what's coming
19 here, tell me what your concern is.

20 MR. VOLPE: Well, I don't think that's
21 how the question was set up. The question was not set
22 up as to his personal observations. I believe -- I
23 don't have the transcript in front of me, Judge -- but
24 I believe it was set up in his role as the
25 commissioner of the Scenic Rivers -- well, as

1 commissioner. I believe that's how the question was
2 set up.

3 THE COURT: Let's address the first.
4 What kind of flow rates he's observed at the river
5 from 2005 or 6 to the present. We'll just take it
6 piece by piece.

7 Go ahead, Mr. Fite.

8 A. In 2005-2006, we were coming off an extended
9 period of time when the flow rates on the hydrograph,
10 or on the gauge stations throughout the basin, had
11 been below the average mean for those -- for -- set it
12 up for everyone in the room.

13 There are a number of gauges in the Illinois
14 River basin that are maintained by the United States
15 Geological Survey and different agencies cooperate for
16 the cost of operating those gauges.

17 The Tahlequah gauge has been online since
18 1936; there's 73 years of record there. You can take
19 that information, you can twist it anyway that you
20 want to, and come up with whatever information you
21 need on a daily basis, hourly basis, monthly basis,
22 annual basis. Come up with a mean over the period of
23 record.

24 Then you can go upstream to Watts. I believe
25 that gauge has been on record now approximately 53

1 years -- 50 years, 53 years. Got the U.S. 412 gauge
2 at Flint Creek just east of Kansas, Oklahoma. That
3 gauge has been operating well over 40 years. The
4 Arkansas 59 bridge that I relayed -- or alluded to has
5 only been of record of 14 years. So these different
6 gauges interact.

7 And one of the things Dr. Roskin taught me in
8 applied fluvial geomorphology techniques -- does
9 anyone need any help with that?

10 Okay. Basically, you understand the width
11 and depth ratios of a stream. Entrenchment rates, and
12 so forth. And you determine what the sinuosity of a
13 stream should be. So if Arkansas 59 is approximately a
14 hundred feet across, it should not run longer than
15 about five to seven widths long before you have a
16 riffle or a pool or a meander or some kind of
17 alteration in a stream.

18 What stream gauges are important for is when
19 you have extended periods where we've been wet and
20 we've had these bank-full frequencies or we've had
21 these 25-year rain events where we have two inches or
22 more in the basin, you're moving gravel and you're
23 scouring the bottom, and so that affects the entire
24 community of the river.

25 And what has happened in a period of time

1 leading up to 2006 is we were below the hydrograph,
2 and so we had no movement going on within the river
3 column, water column, or the substrate, the gravels,
4 and so we had nothing being moved.

5 Then we move into late 2007 and we start
6 getting in the rains in October, and the hydrograph
7 has been for the most part for several -- several days
8 each month over a thousand cubic feet per second. A
9 cubic foot per second equates to 450 gallons per
10 minute passing a point. So some people rely on gauge
11 heights, some people rely on cubic feet per second.
12 Cubic feet per second is an exercise of width times
13 depth times velocity. That's how you come up with
14 cubic feet per second.

15 And the hydrograph is the most important tool
16 that I have at my avail because it tells me whether
17 nutrients are moving through the system, it tells me
18 whether floaters should be on the river, it tells me
19 whether I have erosion going on, it tells me whether I
20 have public safety issues, so forth.

21 THE COURT: Help me out, Mr. Fite. You
22 talk about obviously CFS gauge heights. When you say
23 "hydrograph," are you saying measurement of CFS? Is
24 that what the hydrograph does?

25 THE WITNESS: Yes.

1 THE COURT: Okay.

2 Q. (BY MR. GARREN) How is it you know that
3 there's nutrients running through the water based upon
4 a hydrograph, sir?

5 A. I've done a lot of reading. I've seen a lot
6 of reports. Dr. Sharpley's report; I look in -- going
7 back to 1968, look at Dr. Vollenweider's work;
8 Dr. Kratzer's work in '79; Dr. Meybeck in '82.
9 Dr. Gakstatter, who was here during the Fayetteville
10 days when we were ramping up for that case. USEPA
11 brought in Dr. Gakstatter from the Duluth, Minnesota,
12 lab and some help from the Corvallis, Oregon, lab to
13 try to resolve the issues and to be able to condition
14 the MPS permit for Fayetteville so there wouldn't be
15 the brouhaha between the two states.

16 Anyway, of all of this information I have
17 picked up and read over time, and that's how I know
18 all this, is that I've looked at these other authors'
19 work and I've looked at other river programs and
20 talked to other river managers.

21 From 1995 until just a few years ago, I was
22 the only state representative to the Interagency
23 Council for Wild and Scenic River Coordinating
24 Council. I worked with the National Park Service. I
25 worked with the Bureau of Land Management, U.S. Fish

1 and Wildlife Service, and the Park Service. I was the
2 only state representative and I had a lot of
3 information that came my way as a part of that work.

4 Q. Have you ever been invited to attend a
5 meeting directly with an EPA -- the United States EPA
6 chairman or director?

7 A. Yes.

8 Q. When did that occur?

9 A. It's been a number of years ago. I met with
10 Bill Ruckelshaus.

11 Q. What was the purpose for going?

12 A. The Fayetteville, Arkansas, case.

13 Q. And what did you talk about to him?

14 A. Talked about water quality, nutrients,
15 wastewater treatment plants.

16 THE COURT: Mr. Garren, we're halfway
17 through. Let's take our mid-afternoon break.

18 MR. GARREN: Thank you, Your Honor.

19 *(Short break)*

20 THE COURT: Mr. Garren.

21 MR. GARREN: Thank you, Your Honor.

22 Q. *(BY MR. GARREN)* Mr. Fite, we've gotten a
23 little off stray, but I want to try and get us circled
24 back around. Because we were talking about the Duncan
25 videos that we observed when you made a tour of the

1 basin and you tried to describe what the water was as
2 you seen it.

3 How do you compare the condition of the water
4 this last weekend when you made the tour to what you
5 observed on the videos presented for March of 2009?

6 A. Definitely the water column for the Illinois
7 River and its tributaries this past weekend is
8 different than that that was shown in the videos from
9 March, in that you have a function of photosynthesis
10 going on this time of year, we have direct sunlight,
11 warmer temperatures, nutrients in the water, and thus
12 you have algae production. With that algae
13 production, you also have decay.

14 As one cycle -- one series of algae thrives
15 and starts to die off, the others start to decay, new
16 replace it, and so you have what I consider to be a
17 green cast to the water as opposed to what you would
18 see in a period like February, March.

19 Q. Do you know, sir, whether phosphorus in water
20 is colorless?

21 A. Yes. It's a nutrient that the algae rely on.

22 Q. So holding up a pitcher of water wouldn't
23 tell you whether it's high in phosphorus levels, would
24 it?

25 A. No.

1 Q. When do you see high levels of phosphorus at
2 the river, sir?

3 A. Well, based on my review of --

4 MR. VOLPE: Objection, Your Honor. I'm
5 going to object. Excuse me. I think we're going to
6 get into --

7 THE COURT: Sustained.

8 Q. (BY MR. GARREN) Does the agency as part of
9 its functions and duties compile sampling data from
10 the river over periods of time?

11 A. Yes.

12 Q. Is that data available to the commission to
13 perform its duties and obligations in preserving and
14 protecting the Illinois River Watershed?

15 A. Yes.

16 Q. Is that data available to you and do you use
17 it in your functions as a chairman of the Scenic
18 Rivers Commission?

19 A. Yes.

20 Q. Describe generally the nature of that data
21 that you're looking at.

22 A. Well, we pay for that data. We want to
23 know -- from the day arrived at the river commission
24 in 1983, I've always held to these following
25 principles: Is the river getting better or is it

1 getting worse? If we know that one of the two is
2 happening, can we discern is it between Arkansas or
3 Oklahoma or both? Is the water suitable for primary
4 body contact for recreation?

5 Q. Is it?

6 A. Periods of the year, yes; periods of the
7 year, no.

8 Q. What periods of the year is it not suitable?

9 A. I would suggest to you that it would be
10 somewhere in the order of when the river is 2,000
11 cubic feet per second or greater.

12 Q. And why is that?

13 A. That's when we start seeing the phosphorus --
14 or excuse me -- the bacterial levels for E-coli and
15 enterococcus exceeding the standard. We have three
16 standards -- or excuse me -- three bacterias housed
17 within the water quality standards of the state. They
18 are fecal coliform, E-coli, and enterococcus.

19 I pay attention to the E-coli and
20 enterococcus because those are indicators of bacteria
21 that are those particular bacteria housed within the
22 water quality standards of the two that we look to at
23 indicators when people should not be in the river.

24 When those numbers exceed on the order of --
25 things are wonderful when E-coli is under about 150

1 and enterococcus is under 61. Then we have some
2 periods where we allow for some warnings, but when
3 those numbers elevate, when we see E-coli in the
4 neighborhood of 575, we're thinking that that's
5 something that you don't want to be in the water for,
6 and when we're over about 151, 152, in that ballpark,
7 on enterococcus.

8 Q. What do you mean by "warnings"? What were
9 you referring to as warnings?

10 A. If you go to our Web site, you'll see that
11 for the last two years the Scenic Rivers Commission,
12 in partnership about the Secretary of Environment's
13 office and the Department of Environmental Quality
14 have been putting out advisories to the public on our
15 Web site, plus a weekly advisory contained within my
16 reports to floaters about conditions for the river.

17 Q. We were talking about cubic feet per second,
18 and you've looked at data from 2005, 6 up until
19 present.

20 How does the 2,000 cubic feet flow rate
21 compare to what you see as what I call a typical or
22 average flow at the Illinois River?

23 A. Well, 2,000 CFS in the summer months is
24 considerably greater than what the -- what historical
25 records have been. That would be -- that would exceed

1 what most of the commercial outfitters are floating on
2 the Illinois River when you want to rent a canoe.
3 They don't generally don't want to float children ten
4 years of age or older -- or excuse me -- ten years of
5 age or younger in conditions when the river is greater
6 than about five feet because --

7 Q. How does that relate to the cubic feet per
8 second?

9 A. Well, that's about right where we are.

10 Q. Okay.

11 A. And we have been as an agency for a number of
12 years been talking back and forth with our sister
13 agencies and the United States Geological Survey about
14 bacteria, and we have been trying to develop a
15 surrogate to where when we have a hydrograph reading
16 that's X number, that we can -- we can tie bacteria
17 levels to that. We're moving down that path right
18 now, we have not developed it fully.

19 Q. How long have you been working on that
20 project in order to be able to provide that warning?

21 A. Several years. We got really specific last
22 summer with USEPA grant that Secretary Tolbert when he
23 was at the Secretary of Environment's office was able
24 to arrange for us to do our twice-a-week sampling.

25 Q. Is your commission compiling that data that

1 you've just referred to?

2 A. Yes. There's a report that's published and
3 approved by EPA.

4 Q. All right. Back to the flow rates and the
5 nutrient statement you made that you say nutrients are
6 flowing at that time, what is occurring that causes
7 the nutrients to be in the river that you've
8 described?

9 MR. VOLPE: I'm going to object, Your
10 Honor. Sorry.

11 MR. ELROD: Object.

12 THE COURT: Sustained.

13 Q. (BY MR. GARREN) Let's get back to -- because
14 I'm not sure you've -- we've completed this -- did you
15 compare the flow rates leading up to the time period
16 in which Mr. Duncan pulled his pitcher of water out of
17 the river in those videos?

18 A. Yes.

19 Q. And what did you find in making that
20 observation?

21 A. For the month of March, I believe he was able
22 to grab his samples on one of three days that existed
23 during the entire month where the hydrograph was under
24 1,000 cubic feet per second.

25 Q. And what is the difference if it were above

1 that 1,000 cubic feet per second? What would you be
2 seeing differently?

3 A. As I've said previously, since water year
4 2000 --

5 MR. ELROD: I'm sorry to interrupt, but
6 here's the problem, Judge.

7 You'll hear me say it again and I've said it
8 before: Ed Fite is one the most highly-qualified
9 people that I know. The problem is that they have not
10 disclosed him to give expert opinions in this case,
11 he's not a nonretained expert, and what we're hearing
12 now is an intermixture between observations of facts
13 and ultimately an opinion that tries to tie what
14 certain facts mean together.

15 I simply think that it's improper under the
16 circumstances of the case with the expert report
17 deadline has passed, disclosure deadline has passed.
18 It's absolutely no reflection on Mr. Fite and his
19 expertise, except he's not disclosed as giving these
20 opinions.

21 THE COURT: Response.

22 MR. GARREN: Yeah, Your Honor.

23 Under 701, we're not limited in that sense.
24 This witness can talk about materials, understandings
25 of information, and give his opinions or inferences

1 from it based upon his knowledge that we have tried to
2 establish he has given today.

3 THE COURT: Yes. But by his own
4 testimony, a lot of that understanding is from
5 reading, which is to be commended, but it is hearsay
6 which cannot be cross-examined.

7 There's a line here. Obviously, he can
8 testify from his own observation that in times where
9 the flow is under a thousand cubic feet per second,
10 the water is more clear. That is entirely proper.

11 Now, when we get into the area of phosphorus
12 and source, that's scientific. He can certainly
13 testify as to his observations, as I've said
14 previously. If you can find somebody more
15 knowledgeable than the man on the witness stand about
16 this river, I think that's going to be very difficult.
17 But there is a line.

18 The objection is sustained as to scientific
19 matters. But obviously, I think the question more
20 particularly was to the differentiation between
21 clarity and lack of clarity of the water above and
22 below a thousand feet -- cubic feet per second;
23 correct?

24 MR. GARREN: My response is a couple of
25 things, Judge.

1 First off with the objection by Mr. Elrod,
2 they had an opportunity to depose him, they did depose
3 him, and if these questions were asked or answered,
4 that was their opportunity to do so.

5 Secondly, the one thing that I keep coming
6 back to, and have difficulty with, and that is the
7 rules this is hearsay, Judge. We have a commission
8 that must have data in order to function. What needs
9 to be shown and what would be appropriate under the
10 objection would be the reliability of the data and
11 whether or not it's reliable for this agency to
12 utilize that data in its function.

13 THE COURT: I disagree. An agency is
14 entirely -- it is entirely proper for an agency to
15 rely on hearsay in performing its function. That does
16 not make that testimony of such a quality as it can be
17 presented to a federal court in
18 determining -- determining causation or scientific
19 theories.

20 The objection's sustained with regard to
21 scientific matters. Anything further?

22 MR. VOLPE: I don't want to step on that
23 ruling, Your Honor, but I would point out that the
24 additional thing that's going on here is they're
25 eliciting opinion testimony from this witness, and

1 there was an opportunity for the parties to
2 disclose -- I'll just read it -- list of nonretained
3 witnesses who may offer opinion testimony. I have the
4 State of Oklahoma's list of nonretained witnesses who
5 may offer opinion testimony. Mr. Fite is not on that
6 list.

7 So to the extent they're trying to offer
8 opinion testimony through this witness, it is both
9 improper under the Federal rules of Evidence, but it's
10 also improper under the disclosures in this case.

11 THE COURT: All right. I sustained the
12 objection as to scientific matters. Obviously, if the
13 question goes to clarity above and below one thousand
14 CFS, he may answer.

15 Go ahead, Mr. Fite.

16 MR. GARREN: Do I understand, though,
17 Your Honor, if he's giving an opinion that's based
18 upon inferences which are rationally based on his
19 perception, are those admissible or not --

20 THE COURT: The objection is sustained
21 as to the question asked. Your next question.

22 Go ahead.

23 Q. (BY MR. GARREN) Mr. Fite, you've lived in
24 the Illinois River basin for many years. Do you have
25 an opportunity in your travels around the basin to

1 observe agricultural practices occurring?

2 A. Yes.

3 Q. And have you observed yourself personally the
4 land application of poultry waste?

5 A. Yes.

6 Q. On more than one time?

7 A. Yes.

8 Q. And in doing so, are you able to identify
9 that which is occurring from senses other than just
10 your sight?

11 THE COURT: Please restate that for
12 him.

13 Q. (BY MR. GARREN) Are you able to smell it
14 when it's occurring also?

15 A. Yes.

16 Q. And is it very -- is it a very noticeable
17 smell?

18 A. Yes.

19 Q. Is it one that is confused with other smells
20 you might have available to you in the Illinois River
21 basin?

22 A. No.

23 Q. Is that one way of identifying piles of
24 poultry waste that may be sitting in a field through
25 your sense of smell?

1 A. Yes.

2 Q. Are you familiar, sir, in the Illinois River
3 Watershed of any sub-basins that do not have water
4 treatment plants in them?

5 A. Yes.

6 Q. Can you give me an example of a couple or
7 three?

8 A. Steeley Hollow, Peavine Hollow, Ballard
9 Creek, Fagan Creek, Telemay Hollow, Oil Springs.

10 Q. Have you, sir, ever observed the presence of
11 algae or scum or nonclarity of a water in those areas
12 that you just described?

13 A. Yes.

14 Q. What time of year do you generally see that,
15 if you do?

16 A. Generally April, May, through the summer
17 months.

18 Q. And how often does that occur?

19 A. The last significant recollection of that
20 would have been calendar year 2006.

21 MR. GARREN: Bring up Demonstrative 31,
22 please.

23 Q. (BY MR. GARREN) Did you have an opportunity
24 to observe an event on or about April 20th of 2006
25 dealing with algae in a particular area?

1 A. Yes.

2 Q. I'll ask you to look at the demonstrative
3 exhibit that's shown there in front of you. Do you
4 recognize that?

5 A. Yes.

6 Q. Can you tell the court what happened or what
7 was occurring that day?

8 A. We had just come off -- the river had just
9 been through a series of days of overcast skies where
10 there wasn't direct sunlight, we had an enormous
11 amount of algae that was growing that time of the
12 year, and the dissolved oxygen levels dropped to a
13 point that there was a fish-kill.

14 Q. Where is this located?

15 A. I believe that's site is going to be the Camp
16 Rockaway area just upstream of Round Hollow.

17 MR. ELROD: Pardon me once again, Your
18 Honor. I'm sorry for interrupting.

19 You say this is Demonstrative 31?

20 MR. GARREN: That's what I thought it
21 was.

22 MR. ELROD: That's not on our 72-hour
23 list.

24 MR. GARREN: It's not?

25 MR. ELROD: No, sir.

1 MR. VOLPE: It is, Judge. It is. They
2 sent a second e-mail.

3 MR. ELROD: This is 31? Oh, there's a
4 second e-mail?

5 MR. GARREN: Ten minutes later.

6 MR. ELROD: Never mind.

7 Q. (BY MR. GARREN) Are you personally familiar
8 with this particular event occurring on this time?

9 A. Yes.

10 Q. What else did you observe that -- well, first
11 off, this picture, does it accurately portray what you
12 observed on that day?

13 A. Yes.

14 Q. And were there more than one fish laying
15 belly up in that creek at that time?

16 A. Yes.

17 Q. What did you do as a result of what you saw?

18 A. Contacted the 1-800 number for the DEQ
19 hotline, 1-800-522-0206.

20 MR. GARREN: Let's pull up Demonstrative
21 74, please.

22 Q. (BY MR. GARREN) Mr. Fite, have you had an
23 opportunity to look at that demonstrative before
24 today?

25 A. Yes.

1 Q. And it's been said in this case at one time
2 that it would take somebody to backpack in in order to
3 get pictures of these locations.

4 Are you familiar with these locations?

5 A. Several of them, yes.

6 Q. And with regard to the statement of having to
7 backpack in to an area to take a picture, would that
8 really be necessary, sir?

9 A. No.

10 Q. Do some of these locations that we see in
11 this picture reflect sub-basins that do not have
12 wastewater treatment plants in them?

13 A. May I go over and look at the picture?

14 Q. Please do.

15 THE WITNESS: Judge, there's something
16 terrible that happens when you get to be 52; you lose
17 your eyesight.

18 THE COURT: I'm there.

19 A. Several of them would --

20 Q. (BY MR. GARREN) Thank you.

21 A. -- be outside of a wastewater treatment plant
22 discharge.

23 Q. Can you tell us which ones on there that are
24 identified as to the basin?

25 A. May I see your hard copy where I can read the

1 print?

2 MR. GARREN: Let's see if we can -- I'm
3 not sure if -- can we blow that up one at a time?

4 *(Discussion held off the record)*

5 Q. (BY MR. GARREN) We'll come back to that,
6 Mr. Fite, and try and save some time and we'll have
7 you identify those areas.

8 When do you anticipate the ability of Scenic
9 Rivers to begin posting warnings with regard to
10 bacteria levels, or is that occurring now?

11 A. We have a general advisory on our Web site
12 that is a poster of the dos and don'ts that you do
13 when you go into waters of the state.

14 Q. Did I hear you say earlier in your testimony
15 that you had been conducting sampling in order to
16 create a different kind of warning system?

17 A. Yes.

18 Q. And when do you anticipate having the ability
19 to put that into operation?

20 A. We will wait at least another season, summer
21 season, tourist season, in order for us to be able to
22 weekly sample the Illinois River, Baron Fork, and
23 Flint Creek before we put those advisories up on a
24 "green-okay, yellow-warning, orange-probably should
25 not go" basis.

1 Q. In the role of chairman of the Scenic Rivers
2 Commission, can you tell me who receives complaints,
3 if there are any, with regard to conditions in the
4 river?

5 A. The entire staff.

6 Q. What happens --

7 A. Whoever the public -- whenever the public
8 calls, comes into the office, or e-mails us, whoever's
9 on duty would be the first recipient of that
10 information.

11 Q. What kind of complaints have you personally
12 experienced with regard to water quality that have
13 occurred in the past?

14 A. Fish-kill --

15 MR. VOLPE: I'm going to object, Your
16 Honor. That's -- that is hearsay. That is eliciting
17 testimony --

18 THE COURT: No. Overruled.

19 Q. (BY MR. GARREN) Are there any other types of
20 water-quality complaints that you've received in your
21 position at the Scenic Rivers Commission?

22 A. Yes.

23 Q. Give a description of those kinds that you
24 might receive.

25 A. Dikes on a wastewater treatment lagoon, for a

1 municipality failing, a dike on an animal waste lagoon
2 failing, dead cattle in the river, dead horses in the
3 river, application of liquid manure next to the river
4 running into the river, fertilizer truck upside down
5 at a crossing adjacent to a -- in a tributary to the
6 river would be some examples.

7 Q. Have you had complaints with regard to either
8 smell or foaming of water?

9 A. Yes.

10 Q. And have you had an opportunity yourself to
11 address those kind of complaints?

12 A. Oh, yes. One of the ones that comes to my
13 mind is the foam issue in the winter months. Folks
14 will stop in the office, call, and want to know what
15 the foam is on the river.

16 Q. Do you know yourself what it is?

17 A. Yes.

18 Q. What is it?

19 A. It's -- typically during lower flows, it's
20 going to be residual phosphorus, it's going to be --

21 MR. ELROD: Your Honor, this is -- I
22 object and move to strike. He's moved over into
23 opinion testimony.

24 THE COURT: Sustained.

25 Q. (BY MR. GARREN) Tell us a little bit about

1 the events that you described about the liquid manure
2 application? Can you tell us when that occurred and
3 what you observed?

4 A. Had a complaint that came in. --

5 MR. VOLPE: Judge, excuse me. Never
6 mind.

7 THE COURT: He can see that with his
8 eyes. I don't think it takes an expert.

9 Go ahead.

10 A. I had a complaint from Kamp Paddle Trails,
11 the owner, David Pickle, a number of years ago about
12 the river smelling like manure and I responded.
13 Upstream of Kamp Paddle Trails on a property owned at
14 the time by Dean Wilmoth, I found that a company had
15 land-applied liquid manure in such quantities that it
16 was actually running off into the river.

17 Q. Do you know what company that was?

18 A. Yes. It was George's.

19 Q. And what did you do upon discovering this?

20 A. I contacted the Department of Agriculture and
21 also the local NRCS office and they came out and
22 investigated the site.

23 Q. What authority, if any, does the Scenic
24 Rivers Commission have, other than what you've just
25 described, in a circumstance occurring similar to

1 that?

2 A. We have none.

3 Q. Let's get back to the board, now that we have
4 it, and perhaps you can describe to the court -- and
5 you may step down, if you would --

6 MR. GARREN: If that's okay, Your Honor?

7 THE COURT: You may.

8 Q. (BY MR. GARREN) -- and describe those
9 pictures on the board that you know are in areas that
10 are sub-basins without wastewater treatment plants.
11 And speak up, please.

12 A. The site, I guess for everyone's benefit,
13 would be -- call this north -- the northwest corner of
14 the poster and is not going to have a wastewater
15 treatment facility.

16 The Sager Creek photo at the top center,
17 depending on where that was taken in relation to -- it
18 looks like it appears it's upstream of the waste water
19 treatment facility at Siloam Springs. There's a POTW
20 downstream approximately 200 yards above the state
21 line, so I'm going to say that this -- there is not a
22 wastewater treatment facility here.

23 At Lick Branch, that may be one I have to
24 backpack into. I have to honestly say I've not been
25 to Lick Branch.

1 Q. All right.

2 A. Okay. But it is not going to have a
3 wastewater treatment facility above it.

4 This is going to be a tributary to the --
5 looks to be the Osage Creek -- Osage Creek, and
6 presently Rogers and Springdale discharge above that
7 confluence.

8 The tributary to the extreme right in the top
9 of the picture on Clear Creek, there's not going to be
10 a wastewater treatment facility there. However, it's
11 going to confluence with the Clear Creek where the
12 wastewater previously to the new wastewater treatment
13 plant in Fayetteville discharges. Fayetteville right
14 now does not discharge at this point along --

15 Q. All right. But they're still above the
16 confluence of that creek where the discharge would
17 have occurred in the past?

18 A. Yes, yes.

19 Q. All right.

20 A. Okay. Hamstring Creek, there's not a
21 wastewater treatment facility there.

22 Ballard Creek, there is not a wastewater
23 treatment facility. However, I talked about the
24 animal waste lagoon that failed. There is the Ozark
25 egg farm that has previously caused some issues in

1 Ballard Creek and quite a bit of production there.

2 Q. Were those issues occurring on or about what
3 looks like April 2007 as represented in that
4 picture?

5 A. No, no.

6 Q. All right.

7 A. No. On Fly Creek, there is not a wastewater
8 treatment facility there.

9 There is not one on Terrapin Creek. That is
10 a tributary to Lake Tenkiller proper. It's on the
11 east side. I have been to that creek before.

12 The Park Hill Branch, Park Hill Branch does
13 not have a wastewater treatment facility. However,
14 Park Hill Branch does have -- and depending on where
15 that cross-section is -- there is a livestock auction
16 that is operated on Saturdays where there are animals
17 that are sold. Some of the drainage potentially could
18 get into that creek.

19 Ballard Creek again, we're back in the state
20 of Oklahoma proper, there's not a wastewater treatment
21 facility there. So I've shown you -- this Ballard
22 Creek here is in Arkansas. This Ballard Creek here is
23 in -- excuse me -- it's in Arkansas and this one is in
24 Oklahoma.

25 Tahlequah Creek, this is going to be upstream

1 of the wastewater treatment facility for the City of
2 Tahlequah. I do know in the headwaters of Tahlequah
3 Creek, there is poultry waste that's been applied
4 there. I've seen that.

5 And then the Cincinnati Creek, it does not
6 have one. That's going to be upstream of Lake
7 Francis, upstream of Arkansas 59.

8 Q. All right. Have you had an
9 opportunity -- you may take the witness chair again,
10 sir.

11 Have you had the opportunity over the years
12 to familiarize yourself with the Ballard Creek
13 watershed?

14 A. Yes.

15 Q. And can you describe -- how would you
16 describe the agricultural activities that occur in
17 that sub-basin? What kind do you see occurring?

18 A. Poultry and cattle.

19 Q. And do you have any kind --

20 A. Some horses.

21 Q. Pardon me?

22 A. Some horses.

23 Q. Do you have any kind of estimate of the
24 numbers of poultry compared to the cattle in that
25 area?

1 MR. VOLPE: Judge, I'm going to object;
2 calls for expert testimony. The latter is lack of
3 foundation, I believe.

4 THE COURT: Well, I don't know how much
5 foundation it will take, but sustained.

6 Go ahead.

7 Q. (BY MR. GARREN) How many times did you drive
8 the Ballard watershed in the past few years?

9 A. Many.

10 Q. Enough that you can't remember how many? Is
11 it more than the fingers than you have on your hands?

12 A. I probably go into Arkansas at least twice a
13 month at a minimum.

14 Q. And does that include the Ballard
15 sub-basin?

16 A. Yes.

17 Q. And when you do, have you observed poultry
18 operations there?

19 A. Yes.

20 Q. And are there many poultry operations in that
21 sub-basin?

22 A. Yes.

23 Q. Let's talk a little bit, if you would, sir,
24 about water quality standards that are applied in the
25 Scenic Rivers.

1 Are you familiar with a numerical water
2 quality standard?

3 A. Yes.

4 Q. Are there other water quality standards
5 besides the numerical standard?

6 A. Yes.

7 Q. And generally, what are they?

8 A. The Illinois River and other scenic rivers
9 are the top tier of water quality standards of our
10 state, they're the best of the best. They are the
11 water bodies of our state that the state does
12 everything humanly possible to protect. There's a
13 prohibition on the introduction of manmade pollutants
14 or new point-source discharges into a scenic river
15 once designated. Existing dischargers cannot increase
16 loadings.

17 To define that, if a wastewater treatment
18 facility at Tahlequah was discharging in the river,
19 once it was designated as a scenic river, at a million
20 gallons a day with ten pounds of pollutants in it,
21 they can increase their discharge to two or three or
22 four or five million gallons of water potentially, but
23 they can never elevate that ten pounds of pollutants
24 out of the end of the pipe, they are locked in.
25 That's how we treat them.

1 Q. When was the Scenic Rivers designated?

2 A. 1970.

3 Q. Does the Scenic Rivers have authority to set
4 water quality standards -- I'm sorry -- the commission
5 itself?

6 A. No.

7 Q. Does the Scenic Rivers Commission have any
8 role in what was set as a basis of a numerical water
9 quality standard?

10 A. The commission was very involved in the
11 establishment of a numeric standard. They supported
12 my recommendation.

13 Q. And what was that?

14 A. 0.02 milligrams per liter, or parts per
15 million, in a stream of phosphorus.

16 Q. And how is it that the Scenic Rivers
17 Commission resolved on that particular number in order
18 to make its recommendation?

19 A. It was a recommendation that came about in
20 December of 2000 that I made to the Oklahoma Water
21 Resources Board in an informal hearing on the
22 triennial review of our state's water quality
23 standards.

24 Q. And what was it that the commission did in
25 order to formulate its recommendation to be made to

1 the Water Resources Board?

2 A. They passed a resolution supporting the
3 staff's position.

4 Q. And was that then what you took to the Water
5 Resources Board?

6 A. That was after the fact. I had suggested
7 that to the water board previous to their resolution.

8 Q. All right. What was the basis for the
9 resolution that the Scenic Rivers Commission
10 formulated?

11 A. I asked for their resolution as their
12 director.

13 Q. How is it that you came to arrive at a
14 number .002?

15 MR. VOLPE: I'm going to object, Your
16 Honor. How Mr. Fite arrived at that would call for
17 hearsay and call for expert testimony and it will call
18 for opinion testimony.

19 THE COURT: I think strictly he can
20 state the sources. I don't think he can relate
21 conclusions, but it would not call for the substance
22 of the hearsay if he identified the sources upon which
23 he derived the .02 milliliter standard.

24 Go ahead.

25 Q. (BY MR. GARREN) Can you answer that

1 question, sir? What were the sources that you may
2 have used or relied on in order to make what
3 ultimately was a recommendation from the Scenic Rivers
4 Commission on water quality standards?

5 A. I just happen to be old enough that I
6 remember some of the old programs. One that folks
7 don't talk about now is the Hydraulic Benchmark
8 Network. The Hydraulic Benchmark Network was
9 established in 1963. It basically has looked at -- I
10 think the maximum number of streams that were in that
11 program at any one time were 58.

12 There are streams that are located all over
13 the east United States that were relatively
14 uninhabited or had human influence and were relatively
15 undeveloped and were considered pristine streams.
16 Those are -- those 58 streams are the streams that
17 have the longest historic record known for water
18 quality sampling, uniform, consistent, all of them the
19 same.

20 Following that, the EPA, USEPA, developed
21 what's called NAWQA, N-A-W-Q-A, National Water Quality
22 Assessment Program. That program has been up and
23 functioning for not as long, but again, the same goals
24 adhered.

25 And when I went to the Water Resources Board

1 and suggested the .02 --

2 MR. VOLPE: Judge, I'm going to object.
3 First of all, if I may -- I don't mean to be impolite
4 here -- but this standard that Mr. Fite is talking
5 about is not the standard that was adopted by the
6 Oklahoma Legislature so I don't understand the
7 relevance of this.

8 I let it go with Mr. Hilsher, but now we're
9 getting 50 years of history leading up to a standard
10 that is not the law of the State of Oklahoma.

11 THE COURT: I thought the testimony was
12 this: He had a role in what was set as the numeric
13 water quality standard.

14 MR. VOLPE: He had a role in
15 recommending what was then not passed by the Oklahoma
16 Legislature.

17 THE COURT: Well, what is it -- because
18 you all know this, you've been through discovery, what
19 is its relevance then, Mr. Garren, if it was not
20 adopted as the water quality standard?

21 MR. GARREN: Basically, Your Honor, it
22 was to show the pristine nature of what the stream
23 should be and that the commission had an understanding
24 of what they wanted it to be.

25 THE COURT: The objection's sustained.

1 Let's move on.

2 MR. GARREN: All right.

3 Q. (BY MR. GARREN) How long back -- how far
4 back does it go that water quality testing results
5 were available for the Illinois River Watershed on a
6 similar geometric mean testing?

7 A. 1970.

8 Q. Has, at any time since 1970, the water in the
9 Illinois River basin met this .02 criteria that you
10 discussed?

11 MR. VOLPE: Judge, I'm sorry. You just
12 excluded Mr. Fite from offering testimony on this .02
13 standard. That's not the law in the State of
14 Oklahoma, and now we're just going at it a different
15 way.

16 THE COURT: Yeah. Sustained.

17 MR. GARREN: Your Honor, I'm trying to
18 show some history with regard to the impact and the
19 quality of the water at certain times. This case is
20 not about pollution occurring at a single snapshot in
21 time, but it's a historic pervasive nature that
22 created what we're seeing. I'm trying to use that as
23 a predicate to my next question, and that is, what is
24 the water quality measurements that they're seeing in
25 the river.

1 THE COURT: All right. I see, but
2 you're trying to -- you're using the term .2 standard.
3 This was a recommendation. It wasn't adopted. I
4 didn't know that until you just told me that. You all
5 have been through five years of discovery. I'm the
6 third judge on this case, all right? So don't lead me
7 down these paths where you know we're not going to be
8 able to get this into evidence.

9 Now, in terms of the water quality, if we've
10 got water quality tests since 1970, let's just
11 ask -- I understand now. I think it is relevant with
12 regard to the water quality.

13 Go ahead. And let's not refer to it as "the
14 standard." It's not a standard. It's just a point
15 that was recommended by resolution of the Scenic
16 Rivers Commission. Let's move on.

17 Q. (BY MR. GARREN) Mr. Fite, can you tell us
18 when since 1970 the river has ever been at a .02
19 phosphorus level standard?

20 THE COURT: Let's rephrase, please.

21 MR. GARREN: I misstated.

22 Q. (BY MR. GARREN) With regard to the .03
23 standard -- .037 standard, when was --

24 THE COURT: No, no. Ask him about a
25 .02, but it's not a standard.

1 MR. GARREN: I'm sorry. I'm sorry,
2 Judge. I'm looking at something here, not
3 concentrating.

4 Q. (BY MR. GARREN) What is the measurement that
5 we're looking at when we're looking at .02? What are
6 you measuring?

7 A. 0.02 is the 50th percentile for what
8 phosphorus should be in a stream like the Illinois
9 River based on Dr. Clark's work and others.

10 MR. VOLPE: Objection, Your Honor.

11 THE COURT: Sustained.

12 Mr. Fite, I think all of us -- I think you
13 can tell by the intent listening when you speak, I
14 think everybody in this courtroom understands that
15 you're probably the most knowledgeable in terms of
16 this river, but I can't let you get into scientific
17 matters here. Basically, we're just trying to inquire
18 as to the degradation, or alleged degradation, of
19 water quality since water quality testing results have
20 been available since 1970.

21 Can you tell us kind of about that and how
22 it's -- in terms of a .2 test result, where have
23 we -- kind of lead us from 1970 to the present.

24 MR. GARREN: Actually, it's .02, Your
25 Honor, just to clarify the record.

1 THE COURT: I'm sorry. That's right.
2 .02 milliliters --

3 THE WITNESS: Milligrams per liter, or
4 parts per million.

5 THE COURT: Thank you.

6 THE WITNESS: Be .02 parts per one
7 million parts.

8 A. The upper reaches of the Flint Creek and
9 Baron Fork probably met that standard in 1970. Today,
10 the closest representation to that is going to be
11 Baron Fork at Eldon and it exceeds it. It's currently
12 at .04.

13 Q. (BY MR. GARREN) Thank you. Does the
14 commission have the responsibility for monitoring the
15 water quality in relation to the standard of .037
16 that's been set by the state?

17 A. Yes.

18 Q. And what does it do in the sense of
19 monitoring? Describe what it does.

20 A. Please restate that question. He got up and
21 I thought he was going to object.

22 THE WITNESS: Sorry, Judge. I'm just
23 playing the game.

24 THE COURT: No. You've been
25 well-conditioned.

1 Go ahead.

2 MR. VOLPE: Let me -- I'm sorry,
3 Judge.

4 THE COURT: You were right.

5 THE WITNESS: I was right.

6 MR. VOLPE: Just so -- I've not been in
7 this case for five years like my colleagues here, but
8 one thing I know about the standard is that it's
9 not -- it's a voluntary standard up to June 30th,
10 2012. So we're referring to it as a standard, but I
11 think that's probably imprecise. But if they want to
12 talk about the 0.37 -- it's a criteria. It's a
13 criteria that -- it's a goal, I should say.

14 And I'll hand you up the statute just for
15 your information.

16 THE COURT: Thank you.

17 Q. (BY MR. GARREN) Does the commission obtain
18 sampling itself in order to monitor as to this
19 criteria?

20 A. Yes.

21 Q. Does it report that information when it's
22 collected?

23 A. Yes.

24 Q. To whom does it report it?

25 A. It goes on the EPA STORET and to the agencies

1 that access that STORET.

2 MR. GARREN: May I approach, Your Honor?

3 THE COURT: You may, sir.

4 Q. (BY MR. GARREN) Mr. Fite, I've handed you
5 what's been marked as State's Exhibit 3351 which was
6 admitted yesterday in this court.

7 Have you had an opportunity to review that
8 report?

9 A. Yes.

10 Q. And in doing so, have you relied on that
11 report in performing your work as chairman of the
12 Scenic Rivers Commission, or administrator?

13 A. Yes.

14 Q. And tell us, if you would, please, what's
15 important about that report as it might pertain to you
16 performing your functions for the Scenic Rivers
17 Commission.

18 MR. VOLPE: Judge, the document is in
19 evidence, but what his -- what he thinks is
20 important -- what this witness thinks is important is
21 an opinion.

22 THE COURT: All right. Just one second.
23 Let me get 3351 in front of me.

24 Overruled. Go ahead.

25 Q. (BY MR. GARREN) Does this report that we're

1 looking at provide to you some basis upon which the
2 commission may act or perform its functions?

3 A. Yes.

4 Q. Are other reports similar to this utilized by
5 the commission and you in the performance of those
6 duties to preserve or protect the Illinois River
7 Watershed?

8 A. Yes.

9 Q. What steps do you take, sir, to determine
10 whether the reports that you're looking at, especially
11 the one in front of you here today, they are reliable
12 in nature?

13 A. What steps do I take --

14 Q. Yes, sir. Do you do anything before in
15 reliance on a document you determine whether or not
16 that document comes from a reliable source?

17 A. Yes.

18 Q. And tell briefly us, what would you do?

19 A. This particular document is very substantial
20 to my day-to-day operations because it focuses on
21 Arkansas and Oklahoma, and specifically the Illinois
22 River, and it's authored by a number of federal
23 agencies in collaboration with the Arkansas -- now
24 it's the Arkansas Department of Natural Resources,
25 which used to be the Arkansas Water -- excuse

1 me -- Soil and Water Conservation Commission, Randy
2 Young's shop, and the Oklahoma Conservation
3 Commission.

4 What's important about those two agencies is
5 they are nonregulatory agencies. They are the guys in
6 the white hats that go out and work with farmers,
7 stakeholders in the basin.

8 Q. And what do you mean by "white hat" guys?

9 A. They don't yield -- they don't yield a stick
10 of regulatory oversight.

11 Q. And why is that important to you in your
12 consideration?

13 A. Because this -- this particular document is
14 an approach based on a relationship with stakeholders.

15 Q. Is there factual data compiled in this report
16 that you've seen?

17 A. Yes. This report actually -- previously I
18 cited a number of authors that I read their work in
19 years past, and it's referred to in this report.

20 Dr. Vollenweider in '68, Kratzer in '79, Meybeck in
21 '82, USDA, USEPA's work, it's all housed this here.

22 This predates the release of Dr. Burkes'
23 clean lake study, but it's right in the ballpark with
24 what Dr. Burkes found in the clean lake study in 1996.
25 So it's a very valid document.

1 Q. Do you agree with the conclusions that are
2 stated in that report, sir?

3 MR. VOLPE: I'm going to object, Your
4 Honor.

5 THE COURT: Sustained.

6 THE WITNESS: I thought I was getting on
7 a run, Your Honor.

8 THE COURT: You rely on it, however;
9 correct?

10 THE WITNESS: Yes.

11 THE COURT: All right. Go ahead.

12 Q. (BY MR. GARREN) Are there other types of
13 reports generated from these same agencies that are
14 relied upon routinely by the Scenic Rivers Commission
15 performing its duties and functions?

16 A. Yes.

17 Q. And in addition to the ones that we see here,
18 can you give the court some understanding of other
19 agencies you found to be reliable in supplying data
20 and materials to the Scenic Rivers Commission in order
21 to perform its functions and duties?

22 MR. VOLPE: Thank you, Mr. Fite. I want
23 to object, Your Honor.

24 THE COURT: Yes, sir. Go ahead.

25 MR. VOLPE: Okay. I believe that the

1 question calls for Mr. Fite's opinion on the matters
2 that the commission -- on the matters of what the
3 commission relies upon and what the commission
4 considers reliable. Those are all opinions.

5 THE COURT: I think that's right. It's
6 up to this court to determine what weight to give to
7 the data and materials that are admitted to this
8 court. We're really trying to back-door some of the
9 scientific information.

10 The objection's sustained.

11 Q. (BY MR. GARREN) You've talked about the
12 Scenic Rivers Commission compiling water quality
13 samples and data.

14 What are the general parameters that the
15 Scenic Rivers Commission is testing for and looking
16 at?

17 A. Total phosphorus, orthophosphorus, nitratis
18 nitrite, turbidity, dissolved oxygen, salinity, and
19 several others.

20 Q. And bacteria, as you mentioned earlier?

21 A. Uh-huh. Bacteria.

22 Q. And is this kind of material that is
23 published on the STORET data Web site that you
24 described earlier?

25 A. Yes. There are also some stand-alone reports

1 that have been published.

2 Q. Let's talk again about the river.

3 What would you describe to be a high-flow
4 event? What is that as it pertains to the Illinois
5 River Watershed?

6 A. A Q25, a storm water event that -- or a
7 rainfall event throughout the basin would be two
8 inches or greater.

9 Q. Is that type of an event measurable as a
10 result of water levels or flow rates in the river?

11 A. Yes.

12 Q. And based upon your experience, can you
13 identify when those occur looking at the flows or the
14 levels of the river?

15 A. Actually, the gauge's reporting a storm water
16 event, a runoff event, when it's at a certain height,
17 but what we look at is precipitation. If we know that
18 we're going to have a rainfall event that exceeds that
19 two-inch rainfall within a 24-hour period, we're going
20 to start watching the hydrographs because we know we
21 have a rise coming.

22 Q. And what's the significance of knowing that a
23 rise may be coming?

24 A. During the recreational period, to be able to
25 give warning, ample warning, to floaters so that we

1 don't have accidents, possible drownings.

2 Q. Are there any other reasons that it might be
3 significant?

4 A. Yes. That's when we're going to -- we have a
5 contract with USGS and we pay them specifically to
6 come out and monitor five sites six times a year on
7 storm water events catching runoff -- or catching the
8 rain event as the hydrograph is on a rise at crest and
9 on a fall.

10 Q. And why is that being collected?

11 A. To discern between ambient conditions -- or
12 excuse me -- base flow events and high water events,
13 what kind of nutrient movement that we're having
14 throughout the basin, what sedimentation movement
15 we're having, so forth.

16 Q. So as I understand you to say, data is
17 collected at high flows?

18 A. Yes.

19 Q. And based upon high-flow events, compared to
20 a base-flow event, what is the level of nutrients seen
21 at a high-flow versus base-flow based on your
22 experience?

23 A. As the hydrograph increases, then the runoff
24 increases.

25 Q. Are you familiar with any studies conducted

1 regarding the difference in phosphorus concentration
2 loads to the Illinois River Watershed from high-flow
3 sampling?

4 A. Yes.

5 Q. Can you tell the court what would be the
6 source of that information or that report that you're
7 referring to?

8 A. There's several reports out there. The USGS
9 has published a report for the agency itself that we
10 contracted with them to publish for us. We have --

11 THE COURT: When you say "for the agency
12 itself," you mean for the Scenic Rivers Commission?

13 THE WITNESS: The Scenic Rivers
14 Commission has paid for the report from the USGS.

15 Q. (BY MR. GARREN) What year was that report?

16 A. It was just released.

17 Q. Meaning 2009 or 8?

18 A. Two weeks ago, 2009.

19 Q. All right.

20 A. Going back, Dr. Baxter Vieux and Dr. Moreda
21 have also done some reporting. Dr. Sharpley, as I
22 alluded to earlier, has done some reporting.

23 One report that really sticks out to me was
24 the work that Mark Nelson did in 2002 over at the
25 Arkansas Water Research Center, a very interesting

1 report, the movement of nutrients through the basin.

2 Q. How does that report -- how is it important
3 to the Scenic Rivers Commission in its functions and
4 duties?

5 A. I'm going to answer your question this way.

6 In the 1980s --

7 MR. VOLPE: Judge -- Your Honor, I'm
8 going to interpose an objection here because I think
9 what we're going to get is some opinion testimony
10 about these reports.

11 THE COURT: Well --

12 MR. VOLPE: And none of these reports
13 are in evidence and so it's --

14 THE COURT: You very well may be
15 properly anticipating. I'm going to require you to
16 wait until the question is -- the allegedly improper
17 question is asked. And Mr. Fite is normally not
18 allowed to ask a question, but you didn't object to
19 it.

20 So go ahead, Mr. Fite.

21 THE WITNESS: Thank you, Your Honor.

22 A. In the 1980s, we spent a considerable amount
23 of time on wastewater treatment plants, point source
24 issues. As we moved through the 1980s and we saw what
25 was going on, where we've spent literally billions

1 upon billions of dollars across the United States on
2 wastewater treatment improvements from point source
3 issues, industrial discharges, we started focusing on
4 nonpoint issues.

5 One of the -- one of the issues that we
6 recognized at the Scenic Rivers Commission is that
7 nonpoint source -- potential nonpoint source issues
8 are not going to become an issue until there's a storm
9 water runoff event. So we wanted to quantify what
10 nutrients are moving through the system, through our
11 scenic rivers, when there are Q25 events or greater.

12 That's what we've been attempting to do with
13 chasing these storm water events, and we have been
14 able to discern that there is --

15 THE COURT: Well, I think we need to
16 stop there.

17 Go ahead.

18 Q. (BY MR. GARREN) You've used term "225"
19 event. Tell the court what that is.

20 A. That is a 25-year rain event which within a
21 24-hour period there will be two inches of rain that
22 would be uniformly dispersed throughout the receiving
23 basin.

24 Q. Does that occur more often than 25 years
25 based on your experience?

1 A. I'm going to answer your question this way.

2 March 20th of 2008, a lot of people remember
3 that the Illinois River was at 22.23 feet. It was the
4 6th highest recorded flow on the river since
5 recordkeeping at Tahlequah, the third highest at
6 Watts. That would have been right between a -- that
7 was approximately a 19-year rain event, and the river
8 was flowing approximately 61,000 CFS at Tahlequah.

9 Q. A record?

10 A. That was for -- that was a fairly good storm.
11 The most recent storm that would have been close to
12 about a 50-year event would have been in October of
13 1986 when the river at Tahlequah was at 99,000 CFS.
14 And the highest period of record, which would have
15 been just over a one-hundred-year event, would have
16 been in May of 1950 when the Illinois River was at
17 27.94, Tahlequah was flowing 150,000 CFS.

18 Just for extra measure, the lowest of record
19 was in October of 1956 when the river was less than
20 one CFS at Tahlequah.

21 Q. Let's talk about when people are recreating
22 and put this -- these flows in perspective to what the
23 use of the river -- and what uses of the river are
24 occurring.

25 You've described earlier the 2005 to 2008

1 range of water flows. Take us through, if you would,
2 from low to high what we see in the way of recreation
3 and the level of the water or its flow rates generally
4 on the Illinois River Watershed.

5 A. When the Illinois River is at about 1200 CFS
6 and you're standing in the water column at your knees,
7 you can anticipate there's about 17 pounds of pressure
8 on your legs. That's three-mile-an-hour water. You
9 double the speed of the water, you quadruple it's
10 power.

11 The water is powerful, it's relentless, and
12 it's predictable. There's so many people that get
13 into our waters of these United States when they
14 shouldn't be in there, and the power of the water
15 itself leads to a lot of the accidents.

16 That's an issue with us on the Illinois
17 River, people getting on the river when they shouldn't
18 be there.

19 Q. Okay. Let's talk about generally in the
20 summertime. What kind of flow rates are you typically
21 seeing?

22 A. Less than a thousand CFS.

23 Q. And how far up, in cubic feet per second,
24 before you see that the recreation use of canoes and
25 rafts is no longer permitted?

1 A. The commercial outfitters on the river
2 through their association have adopted a standard back
3 in 1993. When -- it's a two-part standard. The
4 cut-off point is at -- between War Eagle and Diamond
5 Head Resort. But upstream of War Eagle, when the
6 Illinois River is at five and a half feet at the
7 Tahlequah gauge, they do not allow children ten years
8 of age and younger to float, they switch them to
9 rafts.

10 When the river gets to six and a half feet to
11 seven, they take the children -- or excuse me -- they
12 take the children out of the rafts and then they will
13 float individuals that want to up to nine and a half
14 feet, and nine and a half feet is an unsafe level.

15 Q. Between the six-and-a-half and
16 nine-and-a-half-foot level, what kind of rainfall do
17 you see to cause that rise?

18 A. That's going to be a Q25 or greater event
19 that's brought the river up above base flow to bank
20 full.

21 Q. Okay. And from the 1,000 CFS that you
22 described as kind of a normal summer flow, how
23 far -- what is the level of the river in comparison to
24 the four or five feet you've just been talking about?
25 Is it about 18 inches at your knees; is that what

1 you're saying?

2 A. No. When you walk out into the water at 18,
3 at your knees you -- I was trying to describe for you
4 what the pressure of the water was.

5 Q. I'm trying to get some kind of a mental
6 picture, if you would, for the court to understand
7 what is the level of the river at that thousand
8 square -- thousand cubic feet per second versus the
9 four and a half, five and a half feet you talked about
10 earlier?

11 A. It's going to be approximately four and a
12 half to five feet at the Tahlequah gauge.

13 Q. And --

14 A. Or let me rephrase that.

15 At 2,000 CFS, it's going to be a five-foot
16 river at Tahlequah.

17 Q. Thank you. Now, given that, are you telling
18 me that people recreate in a five-foot-level river?

19 A. Yes.

20 Q. And is that considered a high flow for that
21 river?

22 A. No.

23 Q. And what is?

24 A. High flow is going to be approximately six
25 feet.

1 Q. All right. And do you see people -- based
2 upon your years of experience at the Scenic Rivers do
3 you see them recreating in flows at six feet or
4 above?

5 A. Yes.

6 Q. And have you as recently, in fact, seen
7 people recreating in high flow waters?

8 A. Yes.

9 Q. And when did you last observe that?

10 A. The first of this month.

11 Q. And what was occurring?

12 A. Had a runoff event from rain.

13 Q. And what kind of activity did you observe
14 occurring in the river during that rainfall event?

15 A. Rafting, kayaking, canoeing, and swimming.

16 Q. All right.

17 A. That would have been for the month of
18 September. This is October. I'm sorry.

19 Q. Okay.

20 A. I'm off a day.

21 Q. There's a statement made by one of the expert
22 defendants -- one of the defendants' experts that says
23 that there are fewer recreationists during storm
24 periods when flows are highest, most recreations are
25 not exposed to concentrations of bacteria found to

1 occur during high-flow events.

2 Do you agree or disagree with that statement
3 based on your personal observations and experience at
4 the river?

5 A. There are fewer?

6 Q. There are fewer recreationists during storm
7 periods when flows are highest. Most recreationists
8 are not exposed to the concentrations of bacteria
9 found to occur during high-flow events.

10 A. There are fewer floaters in those types of
11 events but there are floaters.

12 Q. All right. With regard to the cubic feet per
13 second, do you know what it is at five feet in the
14 river at one -- let's try and take the same gauging
15 station to give some correlation to what that means.

16 A. Tahlequah gauge?

17 Q. Yes. Try that. At five feet, what's the
18 cubic feet per second?

19 A. I'm going to -- I would have to check
20 the -- my records on that --

21 Q. Okay.

22 A. -- to be exact.

23 Q. What's an estimate based on your experience?

24 A. It's going to be just over 2,000 CFS.

25 Q. When you take it up to six feet, what would

1 you expect to see in CFS at that level?

2 A. You're in the 4500 range, I believe.

3 Q. And if you go up to the nine-foot level, what
4 would you expect to see there?

5 A. Oh, we're going to be 6,000 CFS or better.

6 Q. All right.

7 A. Moving on up. We're going to be -- let me
8 rephrase that. I think we're going to be up closer to
9 the eight to ten thousand CFS range for a
10 nine-and-a-foot river.

11 Q. At the nine-foot level?

12 A. Uh-huh.

13 Q. We've talked earlier about the particular
14 liquid application runoff event from a George's truck.

15 Have you had opportunity in the years that
16 you've lived in the watershed and traveled throughout
17 to observe piles of poultry waste stacked outside and
18 uncovered?

19 A. Yes.

20 Q. And how often have you observed that
21 occurring?

22 A. In recent years, less; in the 1980s, more.

23 Q. With regard to your observations in the
24 Illinois River Watershed on poultry activities,
25 poultry-growing activities, other than stockpiles

1 being uncovered, have you ever observed any other
2 types of activities that cause concern from the
3 standpoint of the Scenic Rivers Commission in your
4 position at chairman?

5 MR. VOLPE: I'm just going to object to
6 the characterization of "stockpiles." I don't think
7 that's what the witness said.

8 THE COURT: Overruled.

9 A. Could you restate that for me?

10 Q. Yeah.

11 MR. GARREN: Let me ask to pull up
12 Demonstrative 16. Let's look at that first.

13 Q. (BY MR. GARREN) Mr. Fite, have you had an
14 opportunity to look at this demonstrative before
15 today?

16 A. Yes.

17 Q. And you understand that the sections colored
18 orange are what the state contends it has evidence
19 relating to waste -- poultry waste application
20 occurring within that section?

21 Are there -- based upon your knowledge and
22 experience, and in particular, personal observations
23 by you, are there areas on that map that you can see
24 would have had poultry waste applications occur that
25 are not colored orange?

1 A. Is this the map for 1998?

2 MR. VOLPE: I'm going to object, Your
3 Honor. I'm sorry. How can this witness testify to
4 that?

5 THE COURT: I agree. This is a
6 demonstrative. Sustained.

7 Q. (BY MR. GARREN) All right. How would you
8 characterize the level of poultry waste applications
9 occurring before 1998 until after 1998 when the
10 Poultry Feeding Operations Act went into effect?

11 A. There was more of it.

12 Q. In relation to what you see today, can you
13 quantify what "more" means?

14 A. Yes. There are fewer poultry operations
15 today that I would see in the Oklahoma side of the
16 Illinois River.

17 Also, participating in the Animal Waste Task
18 Force since 1997 and seeing the ramifications from
19 that, there are a lot of producers that were -- they
20 chose to use their waste produced in their grow-out
21 facilities differently, to send it out of the basin or
22 to not land-apply it.

23 Q. And you're talking about that that's
24 occurring now is what you're saying?

25 A. Yes.

1 Q. Okay.

2 A. That's the difference.

3 Q. Mr. Fite, there's been statements made in
4 this case with regard to your using poultry waste at
5 the Scenic Rivers Commission offices.

6 Do you recall ever having an opportunity to
7 do that?

8 A. Yes.

9 Q. Can you tell the court what -- where you went
10 to get the poultry waste to begin with?

11 A. Went to Earthcare Systems. It was operated
12 by Phil Fredericks. He donated to the Scenic Rivers
13 Commission a pickup load of composted poultry waste
14 after it had been composted in a facility trial that
15 he was doing and we used it in our flower beds.

16 Q. So it was not directly out of a poultry
17 house?

18 A. No, sir.

19 Q. And you're saying it was a single pickup
20 load?

21 A. One pickup load.

22 Q. What was -- what was done with it when you
23 obtained it?

24 A. We filled two flower beds in front of our
25 office -- three flower beds in front of our office and

1 then one to the north of our office.

2 Q. Were those flower beds contained?

3 A. Yes.

4 Q. Let's talk a little bit about the Keating
5 task force. We've heard testimony about it so I'm
6 going to try and skip by some of that so as not to be
7 cumulative.

8 Did you attend the Keating task force?

9 A. Yes.

10 Q. Did you attend most or all of those
11 meetings?

12 A. All the meetings but one.

13 Q. And at those meetings, were there people
14 there from poultry integrator defendants that are the
15 defendants in this case?

16 A. Yes.

17 Q. And can you, from your own memory, tell the
18 court names of representatives and their respective
19 companies that you observed present at those -- at the
20 task force?

21 A. Well, there was Archie Schaffer from Tyson;
22 Bill Mueller from Tyson's; Don Allen, who was the
23 poultry federation executive director, was there; and
24 there were representatives from Simmons.

25 Q. Do you remember the name?

1 A. I believe Claud Rutherford was there once or
2 twice. Lynch Butler possibly. There was a
3 representative from OK Farms, Rick Pruitt, some of his
4 staff.

5 Q. OK Farms is not a defendant in this lawsuit.
6 So can you restrict your --

7 A. I'm sorry. I'm sorry. I'm drawing a blank
8 on it.

9 Q. Do you know a Mr. Ronnie Bradshaw?

10 A. Yes.

11 Q. How do you know him?

12 A. He was on my board of directors for a number
13 of years and was a vice president for Simmons.

14 Q. Was he also a grower?

15 A. Yes.

16 Q. Okay. Did he attend any of the waste task
17 force for Governor Keating?

18 A. No.

19 Q. Do you recall any representatives from
20 Peterson Farms attending any of the task force
21 meetings for Governor Keating?

22 A. Yes. And that name is on the tip of my
23 tongue but I can't remember it. Can't draw it up
24 right now.

25 Q. Do you recall seeing anybody from Cal-Maine

1 Foods?

2 A. No.

3 Q. Did you have an opportunity to communicate
4 with the representatives of the defendant integrators
5 at the task force?

6 A. Yes.

7 Q. And what were the nature and subject of the
8 conversations that you had with them at that time?

9 MR. VOLPE: I'm going to object, Your
10 Honor. I think we're going to get into an area which
11 I'm concerned about, and that is we're going to -- I
12 think what we're going to hear are statements made by
13 some of the poultry representatives that were at the
14 task force. Of course, I believe that's hearsay, but
15 there's a more fundamental problem with what I believe
16 we're going to hear. And that is, this task force
17 was -- came about, came into being due to Governor
18 Keating's executive order. I don't remember the
19 number.

20 But anyway, in that year, he issued an
21 executive order, set up the task force, which had
22 various members of his cabinet and public -- and
23 citizens from the public.

24 When poultry representatives attend those
25 meetings, they are attending essentially a government

1 body, and when they attend a government body, they
2 have the right under the First Amendment to petition
3 the government, to make statements to the government
4 that will not be later used against them in a court of
5 law

6 MR. GARREN: Your Honor --

7 MR. VOLPE: The doctrine is known as
8 the --

9 MR. GARREN: -- may I interject just
10 hearsay?

11 This is another peremptory objection, Your
12 Honor. I haven't asked the question and I would say
13 that I'm not going to ask that question.

14 THE COURT: Yeah. I think we need to
15 wait -- I think it's proper to anticipate but let's
16 wait until the moment.

17 MR. VOLPE: Okay. I'll wait.

18 Q. (BY MR. GARREN) Did you have an opportunity,
19 Mr. Fite, to communicate with one or more of the
20 representatives of the poultry integrator defendants
21 in this case?

22 A. Yes.

23 Q. And do you recall any specific conversation
24 with any particular one at this time?

25 A. Yes.

1 Q. And in that conversation, did you relate to
2 that person any statements?

3 A. Yes.

4 Q. And did any of those statements have to do
5 with the poultry -- the practices of poultry waste
6 application as it might affect the water quality in
7 the Illinois River Watershed?

8 A. Yes.

9 Q. And what did you tell that person, and if you
10 would please identify that person?

11 MR. VOLPE: Judge, I'm sorry. I just
12 had a representation from counsel that they weren't
13 going to get into this and now they're right back
14 where I started.

15 MR. GARREN: That's not what I
16 represented, Judge.

17 THE COURT: All right. Your point was
18 on statements made by poultry industry representatives
19 and their First Amendment rights. What Mr. Garren's
20 talking about is a statement made by Mr. Fite to a
21 poultry industry representative. And the question is,
22 who was that person; correct?

23 MR. GARREN: Correct.

24 MR. VOLPE: I'm not sure that's --

25 THE COURT: And what did Mr. Fite tell

1 that person. I can read the question to you.

2 Here. What did you tell that person, and if
3 you would, please, identify that person.

4 MR. VOLPE: All right. So what did you
5 tell that person? That is hearsay. That is not the
6 First Amendment problem that I -- that I believe will
7 come from the response from that person. But the --

8 THE COURT: No, it's not hearsay.

9 MR. VOLPE: No. What Mr. -- excuse me.
10 With all due respect, Your Honor, if Mr. Fite is going
11 to set -- if the question's going to be, what did you
12 tell the poultry representative, then that is hearsay.
13 What he says what that is --

14 THE COURT: No, no. Overruled. Go
15 ahead.

16 Q. (BY MR. GARREN) Do you recall the question,
17 sir?

18 A. Yes.

19 Q. Okay. Can you tell us who you were
20 communicating with one at a time, if you can, unless
21 they're in a group, and what it is you told them?

22 A. John Elrod. He's got his head down. John
23 and I have talked back and forth about moving waste
24 out of the basin. A suggestion that I made to him
25 over and over and over was about adding a half cent or

1 one cent to the bird in the marketplace to accomplish
2 developing a fund to be able to compensate for moving
3 waste, to which he would offer up ways that we could
4 do a better job of law enforcement in the Illinois
5 River and we went back and forth. I had these same
6 types of conversations with Archie Schaffer, Bill
7 Mueller --

8 MR. VOLPE: Judge, I'm sorry. Again, I
9 got to -- I'm going to object again to turning
10 Mr. Elrod into a witness and then Mr. Schaffer into a
11 witness.

12 THE COURT: No, no. He's talking about
13 what he said to Mr. Schaffer, Mr. Mueller. You can
14 cross-examine Mr. Fite.

15 MR. GARREN: Thank you, Your Honor.

16 THE COURT: Correct?

17 MR. GARREN: Correct.

18 THE COURT: Correct. At least that's
19 what I learned in law school.

20 MR. GARREN: That's all I'm asking --

21 THE COURT: I don't want to create
22 abject error or absolute error here, but you can
23 cross-examine this man.

24 Am I right, Mr. George?

25 MR. GEORGE: I've seen no error, Your

1 Honor.

2 THE COURT: Thank you. Go ahead,
3 Mr. Fite.

4 A. One of the things that I did on the task
5 force is I tried to keep an open line of communication
6 with the poultry companies trying to resolve the
7 issues that related to the Illinois River related to
8 poultry waste land-applied. I've had many
9 conversations with all of the companies, not just the
10 task force, but in other atmospheres.

11 THE COURT: All right. The question to
12 you is, in the task force, specific conversations or
13 specific statements that you made, not statements that
14 they made to you, but statements that you made and to
15 whom specifically. You've named Elrod, Schaffer,
16 Mueller.

17 A. Mueller, Gary George, Otto Jech, Wade Casey.

18 Q. Who is Otto Jech?

19 A. He is a long-time staff member, team member,
20 at George's.

21 Q. All right. And Mr. Casey, what company is he
22 with?

23 A. He's with George's.

24 Q. All right. Any others that you can recall?

25 A. That are not -- I've talked to Claud

1 Rutherford about this, I've talked to Mark Simmons
2 about this, and we've discussed it as well back and
3 forth.

4 Q. All right.

5 MR. WEEKS: Your Honor, just for
6 clarification purposes, I understood that he was going
7 to be testifying about the specific statements that he
8 made to certain people during these task force
9 meetings. I respectfully believe --

10 THE COURT: That's what I understood as
11 well.

12 MR. WEEKS: -- that we've gone far
13 beyond that because I don't believe the people from
14 George's were actually there, these people that he's
15 identified, that I'm aware of.

16 THE COURT: All right. Well, you can
17 cross-examine but that was the question.

18 Go ahead. Let's move on.

19 MR. GARREN: All right. Thank you.

20 Q. (BY MR. GARREN) Now, of that list, sir,
21 we're going to have to test your memory. And do you
22 recall what you told Mr. Otto Jech?

23 A. I've talked about the same subject matter to
24 all of them.

25 Q. And that subject matter is what?

1 A. Transporting the waste out of the basin,
2 proper handling of the waste, and trying to develop a
3 way to fund the transport of that waste to a proper
4 deposition.

5 MR. GARREN: I'm trying to skip through
6 some questions here, Judge, dealing with the task
7 force that are not cumulative, and I apologize for the
8 pause here.

9 THE COURT: No, that's fine.

10 Q. (BY MR. GARREN) Have you, sir, had any
11 specific discussions regarding the effects of
12 land-applied poultry waste with any company
13 representatives at any time?

14 A. Yes.

15 Q. All right. And with regard to that, did you
16 express what your opinion was that you had observed to
17 them?

18 A. Yes.

19 Q. And do you have a specific recollection of
20 any person, and at a time that that type of
21 conversation occurred, with you making that statement?

22 A. Yes.

23 Q. Can you tell the court when and who?

24 A. During the Animal Waste Task Force.

25 Q. Other than the task force?

1 A. Yes.

2 Q. And can you tell me when and who?

3 A. Gary George in his office at Springdale.

4 Q. And do you remember when approximately that
5 might have occurred?

6 A. Probably 2001, 2002. Back in 1998, Bill
7 Mueller with Tyson Foods in 1998. Archie Schaffer,
8 1998.

9 Q. Are these outside of the task force?

10 A. Yes. Task force was in 1997.

11 Q. Let's change the subject a little bit and ask
12 you: What has the Scenic Rivers Commission done to
13 try and address problems that are associated with the
14 water impairment in the river?

15 A. Of course we've been monitoring for a number
16 of years. In recent years, we have -- with the help
17 of the Secretary of Environment, the Conservation
18 Commission, and the poultry industries that do
19 business in the basin, we've been focusing on
20 developing long-term riparian protection strategies by
21 obtaining conservation easements from willing
22 stakeholders for a 30-year period or longer.

23 Q. Why don't we talk about that and then we'll
24 complete your list.

25 Who specifically is in charge of obtaining

1 these conservation easements?

2 A. The Oklahoma Scenic Rivers Commission.

3 Q. And who at the Scenic Rivers Commission does
4 that?

5 A. Myself.

6 Q. And there's been some discussion about
7 funding sources in order to make those purchases of
8 easements. Can you tell the court what those are?

9 A. The funding sources?

10 Q. Yes, sir.

11 A. Be state funds, USEPA funds, and poultry
12 company funds.

13 Q. All right. Let's talk a little bit about the
14 specifics of what has been acquired in the way of
15 conservation easements.

16 Can you give us a rundown generally of what
17 you've acquired for the Scenic Rivers Commission?

18 A. We have been able to successfully negotiate
19 17 agreements for a total of just over 416 acres at a
20 total cost of approximately just under \$800,000. All
21 the agreements are 30 years in duration, with the
22 exception of one tract of land, that's 20.29 acres
23 that's in perpetuity.

24 Q. I'm sorry. How many acres?

25 A. 20.29 acres, which is in perpetuity.

1 Q. Over what period of time did it -- did you
2 have to take in order to acquire these?

3 A. 2007 and 2008, I believe.

4 Q. How did you go about finding people who would
5 participate in and agree to a conservation easement
6 that you've just described?

7 A. The initial process that we found ourselves
8 in when we started this conservation easement program
9 was from the period of time 2000 through 2005. The
10 Oklahoma Conservation Commission had entered into a
11 five-year agreement with stakeholders located in
12 Cherokee and Adair Counties along Baron Fork Creek and
13 the Illinois River to do a like program that was paid
14 on an annual basis of \$50 per acre.

15 That program, when it ended in 2005, was
16 immediately before our state was beginning to roll out
17 on new conservation reserve enhancement program. It's
18 a USDA Farm Service Agency program. What we found as
19 that program was beginning to ramp up is that those 54
20 stakeholders, those riparian landowners that had been
21 the first ones into a conservation strategy with our
22 state, were going to be excluded from the new program
23 because they'd already been compensated for protecting
24 their lands.

25 We worked with former Secretary of the

1 Environment, Miles Tolbert, and Mike Thralls to
2 develop a strategy where we brought money from EPA and
3 state sources to our agency where we could go out and
4 approach these landowners that were going to be
5 excluded to enter a process with the Scenic Rivers
6 Commission.

7 Of the 54 individuals, we sent two sets of
8 letters to each of the stakeholders inviting them in
9 June and July of 2007 to be enrolled in the program.

10 Q. How many again were there?

11 A. Fifty-four --

12 Q. Thank you.

13 A. -- that were on the list. We sent out 54
14 letters two times to those individuals. We had
15 approximately 23 individuals that responded, said that
16 they wanted to be in the program, of the 54.

17 We started looking at the total amount of
18 acreages that were available to us. As we were
19 starting that process, several of them backed out
20 because of their age because our program was going to
21 be a flat 30-year program at a minimum.

22 And so we ended up with 19 stakeholders -- or
23 19 parcels of land; one stakeholder represented two
24 parcels so there's 18 -- that wanted to be in the
25 program. And we started with a pot of money at

1 approximately \$626,000 that had been brought to us
2 through the Secretary of the Environment's office, and
3 some additional money had been added to that from the
4 state coffers through the Conservation Commission,
5 where we were able to take the first 14 individuals on
6 that list of 18 and starting with the smallest
7 acreage, working up to the next largest, we entered
8 agreements in November of 2007.

9 After that period of time, then we entered
10 into three additional agreements using the poultry
11 companies' money for approximately 150 acres.

12 Q. Is that in addition to the 416 you just
13 described, or is that part of it?

14 A. No. That would be a total of 416.

15 Q. Okay.

16 A. Approximately each acre -- there's going to
17 be a couple of acreages that we were able to obtain at
18 a lower cost, but generally we were paying landowners
19 \$75 per acre per year for a 30-year contract. So we
20 were compensating them \$2250 per acre to exclude
21 cattle do, not land-apply animal waste for
22 fertilization, do not graze, do not build a permanent
23 residential structure, and let those riparian areas
24 restore themselves to the tune of about 300 feet back
25 from the water's edge.

1 Q. That was my next question. About how far
2 back from the water's edge would that be? It's 300
3 feet?

4 A. We targeted three hundred feet, but depending
5 on how the topography of the river area is, it could
6 be a hundred feet or it could be five hundred feet.
7 But on average, three hundred feet was our target.

8 Q. All right. Are there any funds left to
9 continue that program?

10 A. Yes. Currently, the Oklahoma Scenic Rivers
11 Commission has approximately just under \$400,000 that
12 the poultry companies have provided to us that we're
13 going to be expending at some point on additional
14 contracts.

15 Q. Is that 400,000 you just described part of
16 the \$1.1 million gift that was given?

17 A. Yes.

18 Q. In relation then to the total dollars that
19 are in this projects, what's the percentage of state
20 or taxpayer monies versus the poultry money gift?

21 A. Well, of the poultry gift, the \$1.1
22 million -- I believe an explanation is due.

23 When the gift was given to the state, it was
24 given to us at \$275,000 per year over a four-year
25 period. Of that money, approximately 100,000 was to

1 be expended on bathrooms for the floating public.

2 Q. Is that total money -- total --

3 A. Of the total, \$1.1 million, \$100,000 was to
4 be expended on bathrooms, \$500,000 to be expended on
5 program work, and that can be from law enforcement all
6 the way across the scale at our agency's functions,
7 and half a million dollars to be expended for these
8 stream bank stabilization, repair and protection
9 strategies.

10 The lion's share of the remaining money is
11 targeted towards that process at this point. We
12 currently have just under \$1.4 million in applications
13 pending. We've had new applications by other
14 stakeholders since this program rolled out.

15 Q. All right. So the total of 800,000 that's
16 been spent to date, how much is that state money or
17 taxpayer money contributions versus the poultry
18 money?

19 A. 625,000 would be federal or state money.

20 Q. Thank you. What is the goal for the Scenic
21 Rivers in this program with regard to the number of
22 acreage it would attempt to acquire?

23 A. With the conservation reserve enhancement
24 program included, it's 9,000 acres on the Oklahoma
25 side of the basin.

1 Q. Do you have any way to put that in
2 perspective of how many miles of river that might
3 equate to?

4 A. All -- all of the scenic river and its
5 tributaries --

6 Q. All right.

7 A. -- above Lake Tenkiller to the state line.

8 Q. Is there any additional funds allocated, or
9 to be allocated, in order to continue this program at
10 this time other than the 400,000 you said is there?

11 A. We're hopeful the new Secretary of the
12 Environment is going to direct some more money to us
13 so we can continue the program.

14 Q. Does that mean no, there is none allocated at
15 this time?

16 A. No, there's none allocated presently.

17 Q. Okay. What other -- are there any fencing
18 restrictions imposed in these easements?

19 A. No.

20 Q. Are there any cattle behavior problems or
21 programs initiated as part of this program?

22 A. Our contracts are quite extensive. The
23 stakeholder, once they enter the contract, agree to
24 exclude cattle or other livestock within that zone
25 that the conservation easement has jurisdiction for.

1 Q. Okay. Now, we were starting down a list of
2 types of programs or activities that have been
3 conducted or are in the process of being conducted by
4 the Scenic Rivers to protect and preserve the water.
5 We started with vegetative filter strips or
6 conservation easements.

7 Is there any stream bank erosion monies being
8 spent at this time for projects?

9 A. Not from the Oklahoma Scenic Rivers
10 Commission --

11 Q. All right.

12 A. -- but from the Conservation Commission and
13 the Department of Wildlife Conservation.

14 Q. And do you know the source of the funds for
15 that program?

16 A. Yes. Stimulus money.

17 Q. Pardon?

18 A. Era money.

19 Q. And what does that mean?

20 A. It's the stimulus package that was passed by
21 Congress. Approximately \$2 million is going to be
22 targeted to Lake -- excuse me -- to the Eucha-Spavinaw
23 drainage in the Illinois River within the next year.

24 Q. And who has the responsibility -- or let me
25 ask you this.

1 Does your commission have responsibility
2 relating to those funds?

3 A. No. We will be on a working committee to
4 prioritize and make sure that the right projects are
5 identified and put in place.

6 THE COURT: How's that split between
7 Eucha-Spavinaw and the IRW?

8 THE WITNESS: I'm hoping a million each.
9 They haven't established that yet.

10 THE COURT: Mr. Garren, you might find
11 an appropriate place to stop.

12 MR. GARREN: This is fine. We're on a
13 list and we can start and pick it up on that.

14 THE COURT: Very good. We'll be in
15 recess until 9:30 a.m.

16 MR. GARREN: Thank you, Your Honor.

17 *(The proceedings were recessed)*
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C E R T I F I C A T E

I, Brian P. Neil, a Certified Court Reporter for the Eastern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in above-captioned case.

I further certify that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 1st day of October 2009.

s/ Brian P. Neil

Brian P. Neil, CSR-RPR, CRR, RMR
United States Court Reporter